United States Court of Appeals for the Second Circuit



APPENDIX

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT.

IRVING MASON, on Behalf of Himself and All Others Similarly Situated, and Derivatively on Behalf of C. I. REALTY INVESTORS,

Appellant,

v.

CITY INVESTING COMPANY, C. I. REALTY INVESTORS, C. I. PLANNING CORPORATION, WILLIAM POLK CAREY, JOHN L. GIBBONS, PETER C. R. HUANG, JAMES V. TOMAI, JR., ROBERT M. MORGAN, WILLIAM S. RENCHARD, FRED R. SULLIVAN, JAMES R. WEBB, and REYNOLDS SECURITIES, INC.,

Appellees.

On Appeal From the United States District Court for the Southern District of New York.

APPENDIX

RICHARD D. GREENFIELD, 111 Presidential Boulevard, Bala-Cynwyd, Pa. 19004

and

REMBAR, WOLF & CURTIS,
19 West 44th Street,
New York, N. Y. 10036
Attorneys for Appellant.

Of Counsel:

RICHARD D. GREENFIELD, P. C.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

PAGINATION AS IN ORIGINAL COPY

INDEX

| <u>Page</u> | 2 |
|---|---|
| Docket Entries la | |
| Amended Complaint 4a | |
| First Amended and Restated Declaration of Trust of C. I. Realty Investors (attached as Exhibit C to Affidavit of Ogden N. Lewis in support of the Motion to Dismiss, Dec. 12, 1975) | |
| Partial Transcript of Hearing before Judge Wyatt, March 19, 1976, pages 1-27 | |
| Judge Wyatt's Order and Final Judgment, May 3, 197692a | |
| Notice of Appeal94a | |

TRANSFERRED FROM THE EASTERN DISTRICT OF PENNSYLVANIA, Peat, Marwick, Mitchell & Co. 2.3 3-19-THEIR NO. 75 Civ 574. FEES PAID THERE.

REYNOLDS, SECURITIES, INC.

SECURITIES COMMODITIES EXCHANGE.

ATTORNEYS Reduce Dar Orisco in the N 18 -41 1. PEME SS ENT. CITYL AVENUE word The hour y Purping (BACA - CYND, PA. 19004 Phila PA 72101 additional Attorneys
Rembar Wolf & Curtis Rembor Wolf & Curtis
19 West 44th Street,NYC 10036 DEWITY BALLANTINE BUSHBY PAIMER & WOOD 140 Broadway-NYC 10005 (31:14-8000) (for deft. "cynolds Securities, Inc. DAVIS POLK & WARDWEIL 1 Chase Manhattan Plaza-NYC 10005 (427 - 3400)(for defts. City Investing Co., C.I. Realty Investors, C.I. Planni Corp., John L. Gibbons, Peter C.R. Huang, James V. Tomai, Jr., William S. Renchard and Fred R. Sullivan)

FILING FEES PAID HERE STATISTICAL CZEDS RECEIPT NUMBER C.D. NUMBER FILED IN APR-15-1975 CARD DATE MAILE 15-5 15.6

| TRUTHE MASON, ON | PEHALF | OF HIMSELF . | ETC, | VS. | CITY | DIVEST DIG | COMPANY, | ET-AL | 75 Civ | 1.811 | |
|------------------|--------|--------------|------|-----|------|------------|----------|-------|--------|-------|--|
|------------------|--------|--------------|------|-----|------|------------|----------|-------|--------|-------|--|

| DATE | NR | PROCEEDINGS | WYATT - COUNTR; J. |
|-----------|--------|--|---|
| 04-15-75 | | Trans ferred from the U.S.D.C. EASTERN DISTRICT OF PENNSYLVANIA, Orders, etc. Their No. 75 Civ 574 Mailed Role 384. Complaint PECCRD OF PROCEEDINGS INTHE U.S.D.C. S.D.N.Y. | Docket Sheet, |
| 04-21-75 | 2 | Filed stip & order extending the time for deft. Reynolds Securities to 04-17-75 | , Inc. to answ |
| 0121-75 | 3 | Filed stip & order extending the time for defts. City Investing Co Investors, C.I. Planning Corp, John L. Gibbons, Peter C.R. Hua Tonai, Tr., Fred R. Sullivan and William S. genchard to answer to Ok-17-75 | o, C.I. Realty ng, James V. to the complain |
| 01:-23-75 | ; · 't | Wiled stip % order extending deft. Reynolds Securities Inc's time t 05-01-75. So ordered- CONNER, J. | o answer to |
| 0121:-75 | ! | Filed stip & order extending the time of deftr. City Investing Co., Investors, C.I. Planning Corp., John L. Gibbons, Peter C.F. Hua Tomai, Jr., William S. henchard and Fred R. Sullivam to answer from Oh-17-75 to O5-01-75. So ordered- COMMER. J. | ne. James V. |
| 05-08-75 | 6 | Wiled ANSVER of deft. "eynolds Securities, Inc. to the complaint | (DBBP&W) |
| p. 05-75 | ? | Filed ANDWER of defts. City Investing Company, C.I. Realty Thyestone | C T Planning |
| | | Corp., John L. Gibbons, Peter C.R. Huang, James V. Tomai, Jr., Will Renchard and Fred E. Sullivan to the complaint | liam S. (DP&) |
| 05-14-75 | 8 | Filed summons and return- served the following: | (2.47) |
| | | Robert M. Morgan by Kim L. Adleman on O4-02-75 John L. Gibbons, personally, on O3-05-75 Fred R. Sullivan by Agnes Marden on O3-03-75 Reynolds Securities, Inc. by John B. Brown on O3-05-75 James V. Tomai, Jr. by Gail Barry on O3-05-75 C.I. Realty Investors by Gail Barry O3-05-75 C.I. Panning Corp. by Gail Barry on O3-05-75 Peter C.R. Huang by Mrs. Ursula Ford on O3-05-75 City Investing Company by Edward P. Sheridan on O3-05-75 William S. Renchard by Margaret Finnegan on O3-12-75 Tames R. Webb- UNEXECUTED- O3-06-75 | |
| 05-40-75 | 9 | Rotice of reassignment to Judge Wyatt. | |
| " | | ffidavit by Ogden N. Lewis in response to pluffs, motion to co., vil 1695 & 75 Civil 1811. | onsolidate |
| 09~24-75 | | File a Motion of Pltffs. to consolidate the actions, Add Peat Marvick Co., as a party deft. & to file an amended complaint. Ret. 10-3-75. 75 Civ 1695) | Mitchell & (Filed In |
| 9-25-75 | 24 | TRIAT. CONFERENCE mand BY Specific | |
| 09-29-75 | | Filed Notice of Appearance for additional attorney for pltff. by Remb Curtis, 19 West 44th Street, NYC 10036 575-8500. | |
| 10-28-75 | 10 | Filed Order that pltffs. motion to consolidate pursuant to rulee42(a) & that pltffs. motion to add Pest Marwick Mitchell & Co., as a Parifile an exceeded complaint is granted. Wyatt J. (mailed notice) | is denied by deft. & |
| | | Filed Pltffs. Notice of Motion for a class action. Ret. 11-21-75. | |
| | | Filed Pitffs. motion for class action determination. Ret. Sine Die. Filed Pitffs. Memorandum in support of application for class action dunder FRCP 23. | letermination |
| 11-11-75 | 14 | Filed Affidavit of Service by mail by Richard D. Greenfield on 11-7-7 | 75. |
| 11-03-75 | 15 | Filed Vitffs. request for production of documents - A. | |
| 11-03-75 | | Piled Pitfs. interrogs. to defts. Set A. | |
| | | Filed Amended Complaint. Filed Stip & Order that pltffs. motion for class action is adjourned t | 12.12.75 |
| | | Wyatt J. Filed Stip & Order that the time for all defts, to answer is extended | |
| | | Wyatt J. Piled Add'l Summons & marshals ret. Served: Peat Marwick Mitchell & Co. | |
| | | PONT TO PRES | |

| | PROCEEDINGS | Date Ord |
|---|--|---|
| 12-8-75 | Filed stip & order that the time of pltffs motion is extended to 1-30-76, and the | Judgment |
| | return date of deftw motion is extend to 1-30-76 and the deft that arever | 3 |
| | to pitis interrogatories is extended to T-30-76. West T | |
| 12-15-75 | Filed Affidavit & Notice of Motion by defts City Investing Company | - |
| | order staying all proceedings and discovery in connection with County I IT and Wi | of t |
| 70 76 76 | Like Amended Complication of the area of the state of the | |
| 75-72-12 | Filed memorandum of law by defts City Inesting Company, et-al as indicated. | |
| 12-16-76 | Filed Notice of | DHAP |
| 15-10-1 | - LICU NULLU UI PULION OV GOLF Post Grandal Military | |
| · • • • • • • • • • • • • • • • • • • • | complaint, etc. withe before the connection with count II of the anended | |
| 12-16- | 75 filed memorandum of Peat Mart, J. on 1-9-75. Filed Stip & order that the return date of support of mutichests, as indicated. dated 12 - 15-75 for an order staying t is action etc. is adjourned to 1-30-76. Wyatt. J. | |
| 1-9-76 | Filed Stip & order that the return date of Fenementenetic, as indicated | |
| | dated 12 - 15-75 for an order staying t is action etc. is adjourned to 1-30-76. | - |
| | | |
| 2-3-7 | 6 Filed mip A or or that defts notion dated 12-12- 75 and 12-15-75 are extended | 15 |
| · | 2 1/2 0 and that pittis answering napers to deft motions should be | 4 4222 |
| | The state of the state of the special and the state of th | 770 |
| | The true of the control of the contr | n · · · · |
| | following a decision by this Court on defts metion to stay the class action etc. | |
| 3-10-76 | their magazinatura of pite? In associate to the state of the | |
| 3-17-75 | filed nearly address pitti in opposition to notion of ofts ate, as indicated. Filed nearrands of difference by the art D. Securical as indicated. | |
| -11-7K | | |
| 471 | | |
| 18-76 | Files ruply materialist of sucto estate the service of suctor to the test the service same | · · · · · · · · · · · · · · · · · · · |
| 30.5/ | 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 | |
| 19-76 | Filed tip comparthat action in the second se | ~ |
| ay-76 | 1 On without my halfe threat | |
| | Ly stir detical to within a state of the stir descriptions | |
| -75 | Filed means a convert to be ritherent. Whetherent. Whethere is a convert to be reconsisted to be reconsisted to be reconsisted to be returned | |
| | the metion in deemed to be tilliaren. Wheth, J. | Lacd |
| -22-76 | Utc. There being no just reason for delay, a final judgment purs. t | |
| | there being no just reason for delay a final judgment and | 10 010 |
| | | .0 |
| -2-76 | | |
| -3-76 3-76 | Filed defts Affidavit in opposition to pltf proposed order etc, as indicated. Filed rder and Final Judgment that all proceedings and discovery in connection with the counts. It is and vi of the Amended Company of the Country of the Amended Company of the Country | |
| | Counts. 1. 11 111 and Vi of the that II proceedings and discovery in connection with | th |
| | of the related case 75 Civ 16 95 and that Counts IV and V of the amended | tion |
| | The state of the s | |
| | The state of the s | |
| The | Court made an express determination that | |
| <u> </u> | fule 54 (b) of the FRCP entry of a final judgment in favor of defts is expressly | .0 |
| | | |
| 5-27-76 | Clerk. 5-4-76. M/N. | |
| | Filed Notic o that pltff Irving Maron appeals to the W.S.C.A.P. from the Order and Final Judgment entered on 5-1-76 as indicated NOV | |
| . 10 | and Final Judgment entered on 5-4-76 as indicated. MAN. | |
| | | |
| | | |
| | | |
| 7 1 10 | | |
| | | |

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IRVING MASON, on behalf of : CIVIL ACTION NO.

himself and all others simi-

larly situated, and deriva- : tively on behalf of

C.I. REALTY INVESTORS,

Plaintiff.

: 75 CIVIL 1811 (I.B.W.)

CITY INVESTING COMPANY,

C.I. REALTY INVESTORS, C.I. PLANNING CORPORATION,

WILLIAM POLK CAREY,

JOHN L. GIBBONS, PETER C.R. HUANG,

JAMES V. TOMAI, JR.,

ROBERT M. MORGAN,

WILLIAM S. RENCHARD. FRED R. SULLIVAN,

JAMES R. WEBB,

REYNOLDS SECURITIES, INC., and PEAT, MARWICK, MITCHELL & CO. :

Defendants. : JURY TRIAL DEMANDED

CLASS ACTION

AMENDED COMPLAINT

Plaintiff, by his attorney Richard D. Greenfield, Esquire for a complaint against defendants alleges upon information and belief:

COUNT I

PARTIES

(a) Plaintiff Irving Mason is an individual with a place of business at 1008 Ormond Avenue, Drexel Hill. in the Eastern District of Pennsylvania and brings this action on behalf of himself and all others similarly situated and derivatively on behalf of C.I. Realty, Investors, ("Investors" or the "Trust"). As a result of the wrongs alleged herein, he purchased 1,000 Units, each containing one Share of Beneficial Interest ("shares") and one warrant of Investors during the time period alleged in paragraph 7.

- (b) Defendant Investors is a real estate investment trust organized pursuant to a Declaration of Trust dated November 10, 1971 and has its principal place of business at 717 Fifth Avenue, New York, New York. Investors shares, which are registered with the Securities and Exchange Commission pursuant to Section 12 of the Exchange Act, 15 U.S.C. 78(b), are traded on the New York Stock Exchange and have been traded in the over-the-counter market.
- (c) Defendant C.I. Planning Corporation ("Planning Corp.") is a corporation with a principal place of business at 717 Fifth Avenue, New York, New York. At all material times, including the time period of the wrongs alleged herein, Planning Corp. controlled and was the purported "advisor" to Investors and was a subsidiary of City Investing Company ("CI").
- (d) Defendant CI is a corporation with a principal place of business at 717 Fifth Avenue, New York, New York. At all material times, including the time period of the wrongs alleged herein, CI controlled Investors and Planning Corp.

- (e) Defendant Peter C.R. Huang is an individual with a place of business c/o CI Planning Corp., 717 Fifth Avenue, New York, New York. At all material times, including the time period of the wrongs alleged herein, he was a Trustee and Chairman of the Board of Investors and Executive Vice-President of CI.
- (f) Defendant James V. Tomai, Jr. is an individual with a place of business c/o CI Planning Corp., 717

 Fifth Avenue, New York, New York. At all material times, including the time period of the wrongs alleged herein, he was a Trustee, President and Chief Executive Officer of Investors and C.I. Mortgage Group (an affiliate of CI) and President of Planning Corp.
- (g) Defendant William Polk Carey is an individual with a place of business at 67 Wall Street, New York, New York. At material times, including the time period of the wrongs alleged herein, he was Vice-President and Director of Corporate Finance for DuPont Glore Forgan, Inc. ("duPont"), one of the two managing underwriters of Investors' public offering, and a Trustee of Investors.
- (h) Defendant John L. Gibbons is an individual with a place of business c/o Chemical Bank, 277 Park Avenue, New York, New York. At all material times, including the time period of the wrongs alleged herein, he was a Trustee

of Investors as well as a Director and member of the Executive Committee of CI.

- (i) Defendant William A. Lyon is an individual with a place of business c/o Dry Dock Savings Bank, 742 Lexington Avenue, New York, New York. At material times, including the time period of the wrongs alleged herein, he was a Trustee of Investors.
- (j) Defendant Robert M. Morgan is an individual with a place of business c/o The Boston Five Cents Savings Bank, School Street, Boston, Massachusetts. At material times, including the time period of the wrongs alleged herein, he was a Trustee of Investors and Vice Chairman and a Trustee of CI Mortgage Group.
- (k) Defendant William S. Renchard is an individual with a place of business c/o Chemical Bank, 20 Pine Street, New York, New York. At material times, including the time period of the wrongs alleged herein, he was a Trustee of Investors.
- (1) Defendant Fred R. Sullivan is an individual with a place of business c/o Walter Kidde & Company, Inc., Clifton, New Jersey. At material times, including the time period of the wrongs alleged herein, he was a Trustee of Investors.

- (m) Defendant James R. Webb is an individual with a place of business c/o F.W. Woolworth Co., Woolworth Building, New York, New York. At material times, including the time period of the wrongs alleged herein, he was a Trustee of Investors.
- (n) Defendant Reynolds Securities, Inc. is a broker and dealer in securities with offices at 1700 Market Street, Philadelphia, Pennsylvania and was the underwriter of the Trust's public offering of April 13, 1972.
- (o) Defendant Peat, Marwick, Mitchell & Co. ("Peat") is a firm of purportedly independent certified public accountants and rendered its opinions as such and as experts in accounting and auditing with regard to the consolidated financial statements, other financial statements and schedules of Investors including those appearing in the prospectus of April 13, 1972 and thereafter in Investor's Annual Reports for 1972, 1973 and 1974 and Reports on Form 10-K filed with the Securities and Exchange Commission for such years.

B. JURISDICTION, VENUE AND NATURE OF ACTION

2. This Court has jurisdiction of this action under Section 22(a) of the Securities Act of 1933, as amended ("Securities Act"), 15 U.S.C. Section 77v, under Section 27 of the Securities Exchange Act of 1934, as amended, ("Exchange Act"), 15 U.S.C. Section 78aa, and under Sections 1331 and

- Plaintiff brings this action under and pursuant to Sections 12(2) and 17(a) of the Securities Act, 15 U.S.C. Sections 771(2) and 77q(a), Sections 10(b), 13(a) and 14(a) of the Exchange Act, 15 U.S.C. Sections 78j(b), 78m(a) and 78n(a) and Rules 10b-5, 13a-1, 13a-11, 13a-13 and 14a-9 adopted by the Securities and Exchange Commission under the authority of Sections 10(b), 13(a), 14(a) and 23(a) of the Exchange Act 15 U.S.C. Section 78j(a), 78m(a), 78n(a) and 78w.
- Many of the acts, conduct, combination and conspiracy charged herein, including the dissemination of a prospectus that appeared in a false and misleading registration statement filed with the Securities and Exchange Commission, the distribution to the investing public of financial reports, operating statements, news releases and brokerage analyses prepared by or with the participation, acquiescence, encouragement, cooperation or assistance of defendant C.I. Realty Investors ("Investors" or "the Trust") and the other defendants named herein occurred in the Eastern District of Pennsylvania.
- The matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs and in connection with the acts, conduct, combination and conspiracy alieged in this Complaint, the defendants, directly and

indirectly, used the means and instrumentalities of interstate commerce, and of the mails, and of the facilities of national securities markets.

C. CLASS ACTION ALLEGATIONS

- 6. Plaintiff is a representative of a class as defined by Rule 23 of the Federal Rules of Civil Procedure and brings this action in behalf of himself and the entire class.

 This suit is properly maintained as a class action under Rules 23(a), 23(b)(1)(B), and 23(b)(3) of the Federal Rules of Civil Procedure.
- 7. During the time period of approximately April 13, 1972 to approximately February 1, 1975, an undetermined number of persons purchased an undetermined number of Shares and Warrants issued by Investors through the medium of national securities markets. In addition, an undetermined number of persons purchased 2,600,000 of Investors' Units on or about April 13, 1972. The class is defined as all those persons who purchased Investors' securities during the period of approximately April 13, 1972 to approximately February 1, 1975.
- 8. Plaintiff does not know the number of class members; it is believed, however, that the number of class members exceeds the number practical for joinder and both the number of class members and the quantity of Investors' securities involved is readily determinable from the records of the Trust or its agents.

- 9. Plaintiff has sustained a loss, is committed to pursuing this action and has retained competent counsel experienced in litigation of this nature. Accordingly, plaintiff is an adequate representative of the class because he has the same interest as all the members of the class; his claims are typical of the claims of the members of the class, and he will fairly and adequately protect the interests of the class.
- secuting separate actions is remote due to the relatively small loss suffered by each class member as compared to the losses suffered by the class as a whole. Plaintiff anticipates no difficulty in the management of this case in this forum. To date, plaintiff knows of one action having been commenced arising out of the circumstances set forth herein, Steinberg v. Carey, et al., Civil Action No. 75 Civ. 1695 (IBW), commenced January 6, 1975 in the United States District Court for The Eastern District of Pennsylvania.
- 11. The questions of law and fact common to the class include:
- (a) Whether the defendants herein entered into a conspiracy and a course of conduct for the purpose of fraudulently inducing plaintiff and the members of the class to purchase securities of Investors for a grossly excessive consideration:

- (b) Whether defendants, in order to effectuate such a conspiracy and in connection with such conspiracy, engaged in acts and conduct in violation of Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission;
- (c) Whether defendants in order to effectuate such a conspiracy, and in connection with such a conspiracy, employed devices, schemes, or artifices to defraud, obtained money or property by means of untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, or courses of business which operated as a fraud and deceit on purchasers of Investors' securities in violation of Sections 12(2) and 17(a) of the Securities Act;
- (d) Whether defendants in order to effectuate such a conspiracy, and in connection with such a conspiracy, filed false reports with the Securities and Exchange Commission and the New York Stock Exchange during the period of approximately March 8, 1972 to approximately February 1, 1975, which omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in violation of Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11 and 13a-13 promulgated thereunder by the Securities and Exchange Commission; and

- (e) Whether defendants in order to effectuate such a conspiracy, and in connection with such a conspiracy, solicited proxies during the period April 13, 1972 to approximately February 1, 1975 through the use and means of material which was false and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in violation of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder by the Securities and Exchange Commission.
- 12. The aforesaid questions of law and fact are common to the class, predominate over questions affecting only individual members, and a class action is superior to other methods for a fair and efficient administration of the controversy since the class is so numerous that joinder of all members is impractical.

D. THE CAUSE OF ACTION

Section 10(b) Securities Exchange Act of 1934 And Rule 10(b)(5).

approximately November 10, 1971 to approximately February 1, 1975, the exact dates being unknown to plaintiff because of the defendants' fraudulent concealment, the defendants engaged in an unlawful combination and conspiracy, pursuant to which defendants, among other matters, engaged in acts, transactions, practices and courses of business which operated as a fraud and

deceit upon plaintiff and members of the class and made various untrue statements of material facts and omitted to state other material facts necessary in order to make statements made, in light of circumstances under which they were made, not misleading to plaintiff, all in violation of Section 10(b) of the Act and Rule 10(b)(5) promulgated thereunder as more fully set forth below, the purpose and effect of which was to cause the plaintiff and members of the class to purchase securities of Investors for an excessive consideration during the period of approximately April 13, 1972 to approximately February 1, 1975 and to permit the defendant Investors to sell to plaintiff and members of the class in a public offering commenced on or about April 13, 1972, 2,600,000 each of Investors' Shares and Warrants for \$65,000,000.00 which was also grossly excessive consideration.

the defendants in order to effectuate the aforesaid conspiracy, consisted, <u>inter alia</u>, of the following misrepresentations by defendants, knowing them to be false when made and intentional concealment of and failure to disclose the material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading to plaintiff and members of the class, all or part of which is contained in, among other documents, a prospectus dated April 13, 1972, which was prepared by defendant Investors with the participation, acquiescence, encouragement, cooperation or assistance of the other defendants.

reduction in yield or in a loss during times of increasing interest rates; and

- (ii) leveraging could and would be used as a device for Planning Corp. to dramatically increase its compensation to the detriment of the Trust.
- (c) the defendants misrepresented the extent to which the Trust's assets would be leveraged;
- (d) the defendants failed to disclose the risks inherent in the Trust's borrowing of short-term funds and, inter alia, that the interest rates on such loans would be subject to dramatic fluctuations with the result that the cost of such loans would be uncontrollable by the Trust;
- (e) the defendants failed to disclose that unlike a traditional investment in real estate, the Trust's security holders were subject to the significant risk that the realizable cash value of an investment in the Trust's securities could be substantially less than the book value or net worth of such securities;
- (f) the defendants failed to disclose that the Warrants sold in the offering or thereafter had no intrinsic value independent of Investors shares and could be

rendered virtually worthless if the market price of those shares declined significantly below \$25 each;

- (g) the defendants failed to adequately disclose the risks inherent in the Trust's "gap financing" and that these risks were not often compensated for by higher interests rates;
- (h) the defendants failed to disclose with respect to the Trust's plan to issue "standby commitments" that the underlying loans would be likely to be taken down during times of rising interests rates and possibly under circumstances where the loans to be made are at interest rates lower than the Trust's cost of borrowing;
- (i) the defendants failed to disclose that securities of the Government National Mortgage Association ("GNMA") and other debt securities to be purchased by the Trust, bear the substantial risk of depreciation in market value and possess other negative characteristics during times of rising interest rates;
- (j) the defendants failed to disclose that inherent riskiness of junior mortgage loans or that the Trust might be required by circumstances to take back such loans in order to dispose of unprofitable or uneasily marketable properties;

- (k) the defendants failed to disclose the risk that commitments made by the Trust for mortgage financing would frequently be made long in advance of funding and that during such delay, increases in the Trust's cost of borrowing could make such financing unprofitable;
- (1) the defendants failed to disclose the risks to the Trust's liquidity inherent in the requirement that the Trust pay out at least 90% of its real estate investment trust taxable income;
- (m) the defendants failed to disclose that the terms and conditions of the Advisory Agreement between Planning Corp. and the Trust ("the Advisory Agreement") were not negotiated at arm's length between the parties nor was such agreement formally negotiated, reviewed or approved by the purportedly unaffiliated Trustees;
- (n) the defendants failed to disclose that by reason of defendant CI's domination of the Trustees, it effectively controlled all actions of the Trust and could, inter alia, block the timely taking of a reserve to cover an investment loss, in order to inflate the assets of the Trust;
- (o) the defendants failed to disclose that the Advisory Agreement was modified subsequent to March 8, 1972 so as to reduce Planning Corp.'s potential liability

- (q) the defendants failed to disclose under "Benefits to Founders" or elsewhere, that upon the payment by the Trust of a \$2.298 million demand note from the proceeds of the offering, CI would be released as guarantor of such note and that if the offering were unsuccessful and the Trust left unfunded, CI would have been obligated to pay off such loan:
- (r) the defendants failed to adequately disclose that under the formula set for compensating Planning Corp., it would be highly motivated to maximize leverage to increase its compensation and that it would be paid on a continuing basis for past efforts without regard to the extent of its current or continuing efforts;
- (s) the defendants misrepresented that pending the use of proceeds for certain specified initial

investments, such funds would be temporarily invested by the Trust and failed to disclose that more than 1/3 of the net proceeds of the offering were to be invested in GNMA mort-gage-backed securities;

- (t) the defendants misrepresented the uses to which the proceeds of the offering would be put and failed to give adequate warning that the greatest part of the Trust's mortgage portfolio would consist of construction, development and second mortgages;
- (u) the defendants misrepresented the purpose and the time of repayment of a certain loan by the Trust to Gerard Oestreicher and his associates and failed to disclose all of its material terms or the circumstances of its commitment;
- (v) the defendants misrepresented material facts with respect to 160 Water Street, New York City and its financing, failed to disclose that its owners were having difficulty in renting its available space in overbuilt lower Manhattan, and that they were having serious difficulty in achieving the rental requirements set by the bank holding the first mortgage on such building;
- (w) the defendants failed to disclose, under "Transactions With Related Persons" or elsewhere, that

subsequent to March 8, 1972, the Trust gave up certain potentially valuable options it had with respect to the property at 160 Water Street and that it materially reduced its benefits under a \$5.75 million loan to a CI affiliate and under a \$2 million loan in which CI Mortgage Group was involved;

- (x) the defendants misrepresented the lack of affiliation of certain Trustees with CI, Planning Corp., CI Mortgage Group or their affiliates and failed to disclose the extent to which the purportedly unaffiliated Trustees had interests that could result im conflicts with their duties as Trustees;
- (y) the defendants failed to disclose the reasons for and the circumstances of the departure of George T. Scharffenberger and Gerard Oestreicher as Trustees prior to April 13, 1972;
- (z) the defendants failed to disclose that defendants Renchard and Webb were not Trustees at the time the investments set out under "Transactions With Related Persons" on page 23 of the prospectus were purportedly approved;
- (aa) the defendants misrepresented the future financial and operating results of the Trust by employing

certain pro-forma statements and summaries in a materially misleading manner and failed to disclose certain information which would enable a prospective investor to examine such statements and summaries in their proper light;

- (bb) the defendants misrepresented by implication that Investors would not make equity investments in urban or central-city areas;
- (cc) the defendants failed to disclose the full extent to which the Internal Revenue Code, as amended, and Investors' Declaration of Trust imposed restrictions on the Trust's methods of doing business and upon the types of income-earning assets which it could hold;
- (dd) the defendants failed to disclose the extent to which the Trust would have to pay purportedly independent contractors and others to perform various services that the Trust was prohibited from performing directly;
- (ee) the defendants failed to disclose that the Trust was prohibited from entering into leases with tenants wherein rental is based upon a percentage of the net income earned by such tenants from the leases premises;
 - (ff) the defendants misrepresented the rights

of shareholders of the Trust in the event of merger, consolidation or sale of assets and failed to disclose that any appraisal rights such shareholders would have could be effectively negated by the acts of the defendants;

- (gg) the defendants failed to disclose that the Trust's inability to hold property primarily for sale to customers in the ordinary course of its trade or business imposes severe limitations upon the Trust's ability to sell loan participations or other portions of its investment portfolio; and
- (hh) the defendants failed to disclose the extent to which the Trust's assets would be used to fund portions of C.I. Mortgage Group's speculative construction and development loans.
- 15. In connection with and in furtherance of the aforesaid fraudulent combination and conspiracy, the defendants engaged in the acts and conduct which they combined, conspired and agreed to do as aforesaid, and each of the defendants has acquiesced, encouraged, cooperated, and/or assisted in the effectuation of such combination and conspiracy.
- 16. By reason of the aforesaid combination and conspiracy, plaintiff and members of the class purchased at

least 2,6000,000 each of Shares and Warrants of Investors at a price of \$25 per Unit for a total of \$65,000,000.00 to plaintiff and members of the class in the offering commenced on or about April 13, 1972. Additional substantial quantities of Shares and/or Warrants were purchased by members of the class up to and including February 1, 1975, also by reason of the aforesaid combination and conspiracy. Subsequently, and due to facts which were either fraudulently concealed or misrepresented to plaintiff and members of the class, the market value of each Share and Warrant of Investors declined drastically and each such Unit thereof recently traded at \$2.00 per Unit, all to the detriment of plaintiff and members of the class in an amount that is presently undetermined.

COUNT II

SECTIONS 12(2) AND 17(a) OF THE SECURITIES ACT OF 1933

- 17. Paragraphs 1 through 16 of this Complaint are incorporated herein by reference as though fully set forth.
- 18. This action is brought under and pursuant to Sections 12(2) and 17(a) of the Securities Act, 15 U.S.C., Sections 771(2) and 77q(a).
 - 19. On or about April 13, 1972, defendants, by

the use of the mails and the means and instrumentalities of interstate commerce and the facilities of national securities exchanges and otherwise, caused to be disseminated prospectuses contained in a registration statement which had been declared effective by the Securities and Exchange Commission on April 13, 1972, to shareholders and prospective shareholders in connection with the public offering of 2,600,000 each of Investors' Shares and Warrants (Units) for \$65,000,000.00 and otherwise participated in the sale of such Units to plaintiff and the members of the class.

20. All defendants have encouraged, cooperated, acquiesced, assisted and participated in the preparation and issuance of the aforementioned registration statement and the sale of shares pursuant to the prospectus dated April 13, 1972, contained therein. As a result, defendants violated Sections 12(2) and 17(a) of the Securities Act in that defendants employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts, and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and engaged in transactions, practices and courses of business which operated as a fraud and deceit upon purchasers with respect to the items more specifically set forth in paragraph 14 of Count I of this Complaint, which are incorporated herein by reference.

SECTION 13(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULES 13a-1, 13a-11 AND 13a-13

- 21. Paragraphs 1 through 16 of this Complaint are incorporated herein by reference as though fully set forth.
- 22. This action is brought under and pursuant to Section 13(a) of the Exchange Act, 15 U.S.C., Section 78m(a) and Rules 13a-1, 13a-11 and 13a-13 promulgated thereunder by the Securities and Exchange Commission pursuant to Sections 13(a) and 23(a) of the Exchange Act, 15 U.S.C. Sections 78m(a) and 78w(a).
- 23. At various times during 1972 to 1975 defendants, by the use of the mails and by the means and instrumentalities of interstate commerce, filed and caused to be filed with the Securities and Exchange Commission and the New York Stock Exchange periodic and other reports including quarterly, semi-annual and annual reports concerning the financial and business condition of Investors.
- 24. All defendants have encouraged, cooperated, acquiesced, assisted and participated in the preparation and filing of these reports which were in violation of Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11 and 13a-13 thereunder, in that such reports and filings contained untrue statements of material facts and omitted to state

material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading with respect to the items specifically set forth in paragraph 14 of Count I of this Complaint, which were incorporated herein by reference.

COUNT IV

SECTIONS 10(b) AND 14(a) OF THE SECURITIES EXCHANGE ACT OF 1934 AND RULES 10b-5 AND 14a-9

- 25. Count IV of this Complaint is instituted derivatively under Section 27 of the Exchange Act, 15 U.S.C., 78aa, for equitable relief and to recover damages against defendants Carey, Gibbons, Morgan, Renchard, Sullivan, Webb, Huang, Tomai, C.I. and Planning Corp. (hereinafter referred to collectively as the "derivative defendants") for the injuries sustained by Investors by reason of such defendants violations of Section 10(b) of the Exchange Act, 15 U.S.C., Section 78j(b) and Rule 10b-5, adopted thereunder hereinbefore alleged in paragraphs 13, 14 and 15 hereof, and of Section 14(a) of the Exchange Act, 15 U.S.C. 78n, and Rule 14a-9 adopted thereunder as hereinafter alleged.
- 26. Paragraphs 1 through 16 of this Complaint are incorporated herein by reference as though fully set forth herein.

- 27. No demand has been made by plaintiff upon Investors, its Trustees or management to bring this action in that such demand would be futile because:
- (a) such parties have been and are part of the continuing scheme to enrich the derivative defendants at the expense of the Trust;
- (b) all of such defendants have long known of, tolerated and approved the acts complained of and are liable for the damages to the Trust; and
- (c) control of an action such as this would be in the hands of the derivative defendants and would thus not be properly prosecuted.

Furthermore, no demand has been made on the share-holders of the Trust to take any affirmative steps for the reason that the derivative defendants have committed breaches of fiduciary duty involving personal misconduct which are not capable of ratification by a majority of the shareholders or by any other means. Under the circumstances, any demand upon the shareholders of the Trust would be meaningless and, in any event, plaintiff has the right to bring this action.

28. Investors was organized under the laws of

Massachusetts pursuant to a Declaration of Trust dated
November 10, 1971 by defendants CI and Planning Corp. primarily as a device to provide substantial sums of money for
use in various real estate projects in which such defendants
and their affiliates had an interest and to yield substantial purported "advisory" fees and other benefits to defendant Planning Corp. Defendant CI had previously organized
for public investment C.I. Mortgage Group and had directly
and indirectly reaped substantial benefits from so doing.

- 29. In Investors' April 13, 1972 prospectus, the "Benefits to Founders" are purportedly set forth in full, including the formula under which Planning Corp. would receive its purported "advisory" fees from Investors. As set forth more fully in Paragraph 14, the defendants failed to disclose how and the extent to which defendant Planning Corp. could and would manipulate the Trust's funds and investments to enrich itself.
- 30. Beginning at least as early as November 10, 1971, the exact date being unknown to plaintiff because of defendants' fraudulent concealment, and continuing as hereinbefore and hereinafter alleged, defendants Huang, Tomai, C.I., Planning Corp. and certain presently unknown co-conspirators engaged in an unlawful combination and conspiracy ("scheme") to accomplish the objectives of:

- (a) Enriching such defendants by means of forming the Trust and thereafter making substantial and excessive charges against it for, <u>inter alia</u>, salaries, advisory fees, organization expenses, all of which benefits accrued to or were directly paid to the derivative defendants;
- (b) Enriching such defendants by, <u>inter</u>

 <u>alia</u>, making or directing investment and business decisions

 of the Trust for the benefit of such defendants and without

 commensurate benefit to the Trust or its security holders;
- (c) Enriching such defendants by means of a scheme to inflate the assets of the Trust by illegal and improper means and to increase purported "advisory" fees and other sums paid to such defendants; and
- (d) Enriching such defendants pursuant to the scheme wherein they would receive other presently unknown substantial benefits unlawfully, improperly and to the detriment of the Trust.
- 31. During the period set forth above, the derivative defendants have approved and/or performed numerous acts and made investments which were primarily for the benefit of CI, Planning Corp. and the other derivative

defendants and to the detriment of Investors including, inter alia:

- (a) the purchase of certain office buildings in Manhattan with a very significant vacancy factor for approximately \$50 million;
- (b) the borrowing of substantially all the funds necessary to consummate such purchase;
- (c) the making of loans and entering into arrangements with affiliates of the defendants which were detrimental to the Trust;
- (d) the overvaluing of the assets of the Trust so as to enhance the purported "advisory" fees based thereupon;
- (e) the execution of the Advisory Agreement without arm's length negotiation and the wording of such Agreement in such manner as to excessively benefit CI and Planning Corp.; and
- (f) the making of investments, the principal purpose of which was to increase Planning Corp.'s purported "advisory" fees, by excessive leveraging and increasing the Trust's assets subject to such fees.

- 32. The objectives of the defendants' schemes, as set forth in paragraph 30 above, were furthered in a manner fraudulent, unfair, inequitable and detrimental to and at the expense of the Trust, by their violation of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder.
- the derivative defendants have participated in the preparation and mailing of proxy statements and other related materials which were and are in violation of Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder in that they made and make untrue statements of material facts and omitted to state other material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, with respect to the matters set forth in paragraph 14 of this Complaint.
- 34. In connection with and in furtherance of the aforesaid fraudulent combination and conspiracy, the derivative defendants engaged in the acts and conduct which they combined, conspired and agreed to do as aforesaid, and each of such defendants has acquiesced, encouraged, cooperated and/or assisted in the effectuation of such combination and conspiracy, all of which constituted and operated as a fraud and deceit upon the Trust in violation of Section 10b, 14(a)

of the Exchange Act and Rules 10b-5, 14a-9 promulgated thereunder.

35. By reason of the aforesaid acts, combination and conspiracy, the Trust has been substantially injured and damaged in an amount that is presently undetermined.

COUNT V

- 36. This Count is instituted derivatively for equitable relief and to recover damages against the derivative defendants pursuant to the Court's pendant jurisdiction.
- 37. Paragraphs 1 through 16 and 27 through 35 are incorporated herein by reference as though fully set forth herein.
- November 10, 1971 to approximately February 1, 1975, the exact dates being unknown because the defendants fraudulent concealment, the derivative defendants approved and/or performed numerous acts, engaged in improper self-dealing and made investments and business decisions which benefited them and injured the Trust notwithstanding their respective positions as fiduciaries of and to the Trust.

39. The acts and conduct set forth in this Count constitute breaches of fiduciary duties owed by the derivative defendants to the Trust and by reason of the aforesaid breaches of fiduciary duties by such defendants, the Trust has been substantially injured and damaged in an amount that is presently undetermined.

COUNT VI

- 40. This Count is brought pursuant to the Court's pendant jurisdiction and is maintained as a class action.
- 41. Paragraphs 1 through 16 and 27 through 35, 38 and 39 of this Complaint are incorporated herein by reference as though fully set forth herein.
- 42. The defendants to this Count are defendants Carey, Gibbons, Morgan, Renchard, Sullivan, Webb, Huang, Tomai, C.I. and Planning Corp. (referred to herein as the "fiduciary defendants").
- A3. During the time period of approximately November 10, 1971 to approximately February 1, 1975, the fiduciary defendants approved and/or performed numerous acts and made investments which caused substantial deterioration in the worth, earnings and investment-related reliability of the Trust and caused the shares and warrants of the Trust to

decline in market value from \$25 per Unit on April 13, 1972 to approximately \$2 per Unit on December 31, 1974.

- 44. During the period April 13, 1972 to February 1, 1975, the fiduciary defendants owed the highest duty to the beneficiaries of the Trust, i.e., the holders of the Trust's shares of Beneficial Interest and Warrants, and by performing the acts alleged herein and profiting therefrom, such defendants breached and violated their sacred position of trust. Accordingly, the class is defined as all those persons who owned Investors' Shares and/or Warrants during the period April 13, 1972 to February 1, 1975 and who sustained loss or diminution of the value of such investment as a result of the acts as alleged herein.
- 45. Plaintiff is an adequate representative of the class because he has the same interest as all the members of the class; his claims are typical of the claims of the members of the class, and he will fairly and adequately protect the interests of the class.
- 46. The questions of law and fact common to the class include:
- (a) Whether the fiduciary defendants, by their acts as Trustees of Investors in contravention of their position of trust violated the fiduciary duties owed

to plaintiff and members of the class; and

- (b) Whether defendants' illegal and improper acts resulted in loss or depreciation of value of the Trust's securities.
- 47. The aforesaid questions of law and fact are common to the class, predominate over questions affecting only individual members, and a class action is superior to other methods for a fair and efficient administration of the controversy since the class is so numerous that joinder of all members is impractical.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands:

- (a) Judgment against each defendant and in favor of plaintiff and each member of the class for damages in an amount determined to have been sustained by plaintiff and each member of the class as represented by him, together with interest and costs of suit, including a reasonable attorney's fee and punitive damages;
- (b) An Order requiring an accounting of all direct and indirect benefits received from the Trust by the derivative and fiduciary defendants and requiring that such

defendants repay the Trust for any unjust enrichment; and

(c) Such other and further relief as may be necessary and appropriate.

OF COUNSEL: Richard D. Greenfield, P.C.

Richard D. Greenfield

111 Presidential Boulevard

Bala-Cynwyd, PA 19004

(215) 667-9677

and

Mortimer B. Wolf Rembar, Wolf & Curtis 19. West 44th Street New York, NY 10036

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IRVING MASON, on behalf of : himself and all others simi- : larly situated, and deriva- : tively on behalf of : C.I. REALTY INVESTORS, :

CIVIL ACTION NO.

Plaintiff,

75 CIVIL 1811 (I.B.W.)

٧.

CITY INVESTING COMPANY,
C.I. REALTY INVESTORS,
C.I. PLANNING CORPORATION,
WILLIAM POLK CAREY,
JOHN L. GIBBONS,
PETER C. R. HUANG,
JAMES V. TOMAI, JR.,
ROBERT M. MORGAN,
WILLIAM S. RENCHARD,
FRED R. SULLIVAN,
JAMES R. WEBB,
REYNOLDS SECURITIES, INC.,
and

PEAT, MARWICK, MITCHELL & CO.,:

:. CLASS ACTION

Defendants. :

JURY TRIAL DEMANDED

VERIFICATION OF AMENDED COMPLAINT

IRVING MASON, first being duly sworn according to law, deposes and says:

- 1. I am the plaintiff in the above titled action.
- 2. I have read the foregoing Amended Complaint and verify that the facts set forth therein are true and

correct to the best of my knowledge, information and belief.

IRVING MASON

Sworn to and Subscribed Before me this day of the subscribed, 1975.

Hotary Public The Control

Sense a series a comment

FIRST AMENDED AND RESTATED DECLARATION OF TRUST OF

C. I. REALTY INVESTORS

THE DECLARATION OF TRUST made the 10th day of November, 1971 by certain original trustees (such persons, so long as they shall continue in office in accordance with the terms of this Declaration of Trust, and all other persons who at the time in question have been duly elected or appointed as trustees in accordance with the provisions of this Declaration of Trust and are then in office, being hereinafter called the "Trustees"), is amended and restated in its entirety, effective as of April 3, 1972, pursuant to Section 11.3 hereof to read as follows:

WITNESSETH:

Whereas, the Trustees desire to form a voluntary association commonly known as a business trust, of the type described in the provisions of Chapter 182, as amended, of the General Laws of Massachusetts, for the principal purpose of raising capital and investing such capital in Real Property and Mortgage Loans; and

WHEREAS, it is proposed that the beneficial interest in the trust assets be divided into transferable shares of beneficial interest, evidenced by certificates therefor, as hereinafter provided;

Now, Therefore, the Trustees hereby declare that they will hold in trust, all property which they are acquiring or hereafter acquire as such Trustees, to manage and dispose of the same for the benefit of the holders of record from time to time of the certificates for Shares issued hereunder and subject to the provisions hereof, to wit:

ARTICLE I

- 1.1 Name. The name of the trust created hereby (the "Trust") shall be "C. I. Realty Investors", and so far as may be practicable the Trustees shall conduct the Trust's activities, execute all documents and sue or be sued under that name, which name (and the word "Trust" wherever hereinafter used) shall refer to the Trustees as Trustees, and not individually, and shall not refer to the officers, agents, employees or Shareholders of the Trust. Should the Trustees determine that the use of such name is not advisable, they may use such other name for the Trust as they deem proper and the Trust may hold its property and conduct its activities under such other name.
- If C. I. Planning Corporation shall cease to act as Advisor (as defined in Section 1.4 hereof), the Trustees shall, upon the written request of C. I. Planning Corporation, promptly amend this Declaration to change the name of the Trust to one which does not include any reference to "City Investing" or to "C. I." or to any other approximation or abbreviation thereof.
- 1.2 Location. The Trust shall maintain an office in Boston, Massachusetts, and may maintain such other offices as the Trustees may determine.
- 1.3 Nature of Trust. The Trust shall be of the type commonly termed a business trust, and is not intended to be and shall not be deemed to be a partnership, joint venture, corporation or joint stock company. The Shareholders shall be beneficiaries, and their relationship to the Trustees shall be solely in that capacity in accordance with the rights conferred upon them hereunder. Except to the extent the Trustees determine to allow such qualification to lapse for one or more fiscal periods, the Trust is intended to operate so as to qualify as a "real estate investment trust" as defined in the REIT Provisions and this Declaration and all actions of the Trustees hereunder shall be construed in accordance with such intent.

1.4 Definitions. As used in this Declaration, the following terms shall have the following meanings:

"Advisor" shall mean any Person appointed by the Trustees under Article IV hereof.

"Affiliate" shall mean, as to any corporation, partnership or trust, any Person: (i) who holds beneficially, directly or indirectly, five percent (5%) or more of the outstanding capital stock, shares or equity interests of such corporation, partnership or trust; or (ii) of which five percent (5%) or more of its outstanding capital stock, shares or equity interests are held beneficially, directly or indirectly, by such corporation, partnership or trust; or (iii) who directly or indirectly controls, is controlled by, or is under common control with, such corporation, partnership or trust; or (iv) who is an officer, director, employee, partner or trustee of such corporation, partnership or trust, or of any Person which controls, is controlled by, or is under common control with such corporation, partnership or trust.

"Declaration" shall mean this Declaration of Trust as amended from time to time. References in this Declaration to "Declaration", "hereof", "herein" and "hereunder" shall be deemed to refer to the Declaration rather than the article or section in which such words appear.

"Executive Committee" shall mean the committee referred to in Section 3.6 hereof.

"Gap Loan" shall mean a Junior Mortgage Loan made under circumstances in which (i) the amount of such Loan does not exceed the unfunded portion of the difference between the minimum amount a lender is obligated to advance with respect to certain Real Property and the total amount such lender is obligated to advance assuming satisfaction of specified conditions and (ii) the only Mortgage senior to the lien of such Junior Mortgage Loan is the Mortgage securing the loan such lender is obligated to make.

"Junior Mortgage Loan" shall mean a Mortgage Loan the lien of which takes priority over all other charges upon specified Real Property other than the liens of one or more other Mortgage Loans. Such priority shall not be deemed abrogated by other claims normally deemed in the locality in which the Real Property is located not to abrogate the priority of a Mortgage.

"Mortgage" shall mean a security interest in Real Property.

"Mortgage Loan" shall mean a loan evidenced by an obligation which is secured by a Mortgage. .

"Net Assets" shall mean the Total Assets of the Trust less the Total Liabilities of the Trust, except that depreciable assets shall be included therein at the lesser of fair market value as determined by the Trustees or cost before provision for depreciation.

"Person" shall mean and include individuals, corporations, partnerships, trusts, associations, joint ventures and other entities, whether or not legal entities, and governments and agencies and political subdivisions thereof.

"Real Property" shall mean improved and unimproved land, improvements, furniture and fixtures located on or used in connection with land, and any interest in any of the foregoing, including a leasehold interest, an interest in air, subterranean or mineral rights, but shall not include Mortgage Loans.

"REIT Provisions" shall mean Sections 856 through 858 of the Internal Revenue Code of 1954, as now enacted or hereafter amended or supplemented, and any successor statutes, and regulations and rulings promulgated thereunder.

"Securities" shall mean any stock, shares, voting trust certificates, bonds, debentures, notes, or other evidences of indebtedness or in general any instruments commonly known as "securities" or any certificates of interest, shares or participations in temporary or interim certificates for, receipts for, guarantees of, or warrants, options or rights to subscribe to, puchase or acquire any of the foregoing.

"Securities of the Trust" shall mean any Securities issued by the Trust.

"Shareholders" shall mean as of any particular time all holders of record of outstanding Shares at such time.

"Shares" shall mean the shares of beneficial interest of the Trust de cribed in Section 7.1 hereof.

"Subsidiary" shall mean, as to any Person, any other Person over 50% of the outstanding capital stock, shares or other equity interest of which is owned beneficially, directly or indirectly, by such Person.

"Total Assets of the Trust" shall mean the aggregate value of all the assets included in the Trust Property as such value appears on the most recent balance sheet of the Trust, prepared in accordance with generally accepted accounting principles, before deduction of any Mortgage Loan or other obligation secured by an interest to which such assets are subject and before non-eash provision for depreciation and amortization but after provision for bad debt loss and similar reserves.

"Total Liabilities of the Trust" shall mean the aggregate of all indebtedness of the Trust and indebtedness secured by an interest in an asset of the Trust, whether or not the Trust is otherwise liable therefor, and all other liabilities of the Trust, including deferred expenses and reserves out of earnings or assets other than non-cash provision for depreciation and amortization, as such liabilities appear on the most recent balance sheet of the Trust, prepared in accordance with generally accepted accounting principles.

"Trust Property" shall mean as of any particular time any and all property, real or personal, tangible or intangible, which at such time is owned or held by or for the account of the Trust or the Trustees.

"Wrap-Around Loan" shall mean a Mortgage Loan which is subject to a prior Mortgage (which has been created prior to or simultaneously with the creation of the Wrap-Around Loan) and is made on the basis of the current values of the mortgaged properties without regard to and without discharging the prior Mortgage; provided, however, that a Mortgage Loan shall not be included in the term "Wrap-Around Loan" unless the indebtedness secured by the Wrap-Around Loan when added to the indebtedness secured by the prior Mortgage and considered as a single first Mortgage Loan would comply in all respects with the requirements relating to an investment by the Trust in such a first Mortgage Loan.

ARTICLE II

TRUSTEES

2.1 Number and Qualification. The number of Trustees shall be fixed from time to time by written instrument signed by a majority of the Trustees then in office, provided, however, that the number of Trustees shall in no event be less than five or more than fifteen (except prior to the first public offering of Securities of the Trust). Any vacancy created by an increase in Trustees may be filled by the appointment of an individual having the qualifications described in this Article made by a written instrument signed by a majority of the Trustees then in office. Any such appointment shall not become effective, however, until the individual named in the written instrument of appointment shall have accepted in writing such appointment and agreed in writing to be bound by the terms of this Declaration of Trust. No reduction in the number of Trustees shall have the effect of removing any Trustee from office prior to the expiration of his term. Whenever a vacancy in the number of Trustees shall occur, until such vacancy is filled as provided in Section 2.4 hereof, the Trustees in office, regardless of their number, shall have all the powers granted to the Trustees and shall discharge all the duties imposed upon the Trustees by this Declaration of Trust. A Trustee shall be an individual at least 21 years of age who is not under legal disability. The Trustees, in their capacity as Trustees, shall not be required to devote a substantial part of their time to the business and affairs of the Trust.

- 2.2 Term and Election. Each Trustee named herein, or elected or appointed prior to the first annual meeting of Shareholders, shall (except in the event of resignations or removals or vacancies pursuant to Section 2.3 or 2.4 hereof) hold office until his successor has been elected at such meeting and has qualified to serve as Trustee. Beginning with the Trustees elected at the first annual meeting of Shareholders, the term of each Trustee shall expire at the next annual meeting of Shareholders following the election or appointment of such Trustee and upon the election and qualification of his successor. Trustees may succeed themselves in office. Election of Trustees at an annual meeting shall be by the affirmative vote of the holders of at least a majority of the Shares entitled to vote present in person or by proxy at such meeting. The election of any Trustee (other than an individual who was serving as a Trustee immediately prior thereto) shall not become effective unless and until such person shall have in writing accepted his election and agreed to be bound by the terms of this Declaration of Trust. Trustees need not own Shares.
- 2.3 Resignation and Removal. Any Trustee may resign his trust (without need for prior or subsequent accounting) by an instrument in writing signed by him and delivered or mailed to the Chairman, the President or the Secretary and such resignation shall be effective upon such delivery, or at a later date according to the terms of the notice. Any of the Trustees may be removed (provided the aggregate number of Trustees after such removal shall not be less than the number required by Section 2.1 hereof) with cause, by the action of two-thirds of the remaining Trustees. Upon the resignation or removal of a Trustee, or his otherwise ceasing to be a Trustee, he shall execute and deliver such documents as the remaining Trustees shall require for the purpose of conveying to the Trust or the remaining Trustees any Trust Property held in the name of the resigning or removed Trustee. Upon the incapacity or death of any Trustee, his legal representative shall execute and deliver on his behalf such documents as the remaining Trustees shall require as provided in the preceding sentence.
- 2.4 Vacancies. The term of office of a Trustee shall terminate and a vacancy shall occur in the event of the death, resignation, bankruptcy, adjudicated incompetence or other incapacity to exercise the duties of the office, or removal of a Trustee. No such vacancy shall operate to annul this Declaration of Trust or to revoke any existing agency created pursuant to the terms of this Declaration of Trust. In the case of an existing vacancy (other than by reason of an increase in the number of Trustees) the holders of at least a majority of the Shares entitled to vote, acting at any meeting of Shareholders called for the purpose, or a majority of the Trustees continuing in office acting by written instrument or instruments, may fill such vacancy, and any Trustee so elected by the Trustees shall hold office until the next annual meeting of Shareholders and until his successor has been elected at such meeting and has qualified to serve as Trustee.
- 2.5 Independence of Trustees. After such time as a Registration Statement under the Securities Act of 1933, as amended, covering the first public offering of Securities of the Trust shall have become effective, not more than 49% of the Trustees or members of the Executive Committee or other committee of the Trustees shall be Affiliates of the Advisor (it being understood that for the purposes of this provision a Trustee or such a member shall not be deemed to be an Affiliate of the Advisor solely by reason of the fact that such Trustee is a Trustee of C. I. Mortgage Group or its successors). In the event of the death, resignation, removal or change in affiliation of any such person, which results in non-compliance with this requirement, the Trustees shall within 60 days appoint a sufficient number of Trustees or members of such Executive Committee or other committee, or take such other action as may be necessary to comply with this requirement. Failure so to comply shall not affect the validity or effectiveness of any action of the Trustees or of the Executive Committee or other committee of the Trustees as the case may be.
- 2.6 Meetings. Meetings of the Trustees shall be held from time to time upon the call of the Chairman, the President, the Secretary or any two Trustees. Regular meetings of the Trustees may be held without call or notice at a time and place fixed by the Trustees' Regulations or by resolution of the Trustees. Notice of any other meeting shall be mailed or otherwise given not less than 48 hours before the

meeting but may be waived in writing by any Trustee either before or after such meeting. The attendance of a Trustee at a meeting shall constitute a waiver of notice of such meeting except where a Trustee attends a meeting for the express purpose of objecting to the transactions of any business on the ground that the meeting has not been lawfully called or convened. The Trustees may act with or without a meeting. A quorum for all meetings of the Trustees shall be a majority of the Trustees. Unless provided otherwise in this Declaration of Trust, any action of the Trustees may be taken at a meeting by vote of a majority of the Trustees present (a quorum being present) or without a meeting by written consents of a majority of the Trustees.

The Executive Committee or other committee of the Trustees may act with or without a meeting. A quorum for all meetings of any such committee shall be a majority of the members thereof. Unless provided otherwise in this Declaration, any action of any such committee may be taken at a meeting by vote of a majority of the members present (a quorum being present) or without a meeting by written consent of a majority of the members.

With respect to actions of the Trustees and the Executive Committee or other committee of the Trustees, Trustees who are Affiliates within the meaning of Section 1.4 hereof or otherwise interested in any action to be taken may be counted for quorum purposes under this Section and shall be entitled to vote.

All or any one or more Trustees may participate in a meeting of the Trustees or any committee thereof by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and participation in a meeting pursuant to such communications shall constitute presence in person at such meeting.

- 2.7 Officers. The Trustees shall annually elect a Chairman, a President and a Secretary. The Trustees may elect or appoint or authorize the Chairman or President to appoint such other officers or agents with such powers as the Trustees may deem to be advisable.
- 2.8 Trustees' Regulations. The Trustees may adopt and from time to time amend or repeal Regulations for the conduct of the business of the Trust.

ARTICLE III Powers of Trustees

- 3.1 General. The Trustees shall have exclusive and absolute control over the Trust Property and over the business of the Trust to the same extent as if the Trustees were the sole owners of the Trust Property and business in their own right, but with such powers of delegation as may be permitted by this Declaration. The Trustees may perform such acts as in their sole discretion are proper for conducting the business of the Trust. The enumeration of any specific power herein shall not be construed as limiting the aforesaid power. Such powers of the Trustees may be exercised without order of or resort to any court.
- 3.2 Investments. The Trustees shall have power, for such consideration as they may deem proper, to acquire, for cash or other property or through the issuance of Securities of the Trust, and hold for investment, interests of any type in property of any kind wherever located.

The Trustees shall not be limited to investing in obligations maturing before the possible termination of the Trust, nor shall the Trustees be limited by any law limiting the investments which may be made by fiduciaries, but they shall have full power to make any investments, within the limitations of this Declaration, that they in their discretion shall determine, and without liability for loss.

3.3 Legal Title. Legal title to all the Trust Property shall be vested in the Trustees as joint tenants except that the Trustees shall have power to cause legal title to any Trust Property to be held by or in the name of one or more of the Trustees, or in the name of the Trust, or in the name of any other Person as nominee, on such terms as the Trustees may determine provided that the interest of the Trust therein is appropriately protected.

The right, title and interest of the Trustees in the Trust Property shall vest automatically in each person who may hereafter become a Trustee upon his due election and qualification. Upon the resignation, removal or death of a Trustee he shall automatically cease to have any right, title or interest in any of the Trust Property, and the right, title and interest of such Trustee in the Trust Property shall vest automatically in the remaining Trustees. Such vesting and cessation of title shall be effective whether or not conveyancing documents have been executed and delivered.

- 3.4 Disposition of Assets. The Trusteec shall have power to sell, encumber, lease, dedicate or dispose of all or a part of, or an interest in, any Trust Property free and clear of any trusts, on such terms as they shall deem proper and in connection therewith and in connection with the operation and development of any Trust Property, to execute and deliver any instrument they deem necessary or advisable, including without limitation proxies, waivers, deeds and contracts.
- 3.5 Financings; Issuance of Securities; Facsimiles. The Trustees shall have power to borrow in any amount and on any terms as they shall determine; provided, that, after giving effect to any proposed borrowing, the aggregate principal amount of all such obligations shall not exceed 500% of the Net Assets of the Trust.

The Trustees shall have power to issue to any Persons any type of Securities of the Trust, including Shares, securities convertible into Shares, and securities with maturities exceeding the possible date of termination of the Trust, without vote of the Shareholders, for such consideration, in such amounts, and on such terms as the Trustees may deem advisable, and to list any Securities of the Trust on any securities exchange and to acquire, hold, cancel or reissue, Securities of the Trust provided that at least one of the authorized signatures on any Securities of the Trust be manual or the Securities be manually countersigned or authenticated (unless then current commercial practice does not require manual countersignature or manual authentication) by a transfer agent, registrar, authenticating agent, trustee or similar Person. In case any Person whose signature shall appear on Securities of the Trust shall have ceased to perform the function with respect to which such signature was authorized before such Securities have been issued, such Securities may be issued with the same effect as though such Person had not ceased to perform such function.

- 3.6 Delegation; Committees. The Trustees shall have power, consistent with their continuing exclusive authority over the management of the Trust and the Trust Property, to delegate from time to time to such of their number or to officers, employees or agents of the Trust the doing of such things and the execution of such instruments either in the name of the Trust or the names of the Trustees or otherwise as the Trustees may deem expedient, except that (i) powers of the Trustees relating to the approval of investments for the Trust may be delegated only to an Executive Committee consisting of two or more Trustees, and (ii) powers of the Trustees relating to the approval of transactions pursuant to Article X hereof may not be delegated.
- 3.7 Collection and Payment. The Trustees shall have power to collect all property due to the Trust; to pay all claims, including taxes, against the Trust Property; to prosecute, defend, compromise or abandon any claims relating to the Trust Property; to foreclose any Mortgage or other security interest securing any obligations, by virtue of which any property is owed to the Trust; and to enter into releases, agreements and other instruments.
- 3.8 Expenses. The Trustees shall have power to incur and pay any expenses which in the opinion of the Trustees are necessary or incidental to carrying out any of the purposes of this Declaration of Trust, and to pay reasonable compensation from the funds of the Trust to themselves as Trustees. The Trustees shall fix the compensation of all officers and Trustees. The Trustees may pay themselves such compensation for special services, including legal, underwriting, syndicating and brokerage services, as they in good faith may deem reasonable and reimbursement for expenses reasonably incurred by themselves on behalf of the Trust.

- 3.9 Allocation and Valuation. The Trustees shall have power to determine whether property received by the Trust shall be charged or credited to income or capital and, if credited to capital, whether to the Shares of Beneficial Interest account or to Additional Paid-In Capital (except that at least an amount of the consideration received for Shares equal to the par value thereof shall be credited to the Shares of Beneficial Interest account), and to determine in what manner any expenses are to be borne as between income and capital (whether or not in the absence of such power such property would be regarded as income or as capital or such expense would be charged to income or to capital); and to provide reserves for depreciation, amortization and obsolescence of any Trust Property in such amounts as they shall determine. The Trustees shall have power to determine conclusively the value of any of the Trust Property and of any consideration hereafter acquired or disposed of by the Trust, and to revalue the Trust Property.
- 3.10 Advisory Board. (a) The Trustees may at their option appoint not more than fifteen (15) individuals to serve as an Advisory Board for the Trust, whose duties will be to review the Trust operations, investments and policies and make recommendations in connection therewith to the Trustees. The Trustees, however, shall not be bound by the recommendation of the Advisory Board, and the Advisory Board shall have no power or authority to, and no action taken by them shall, bind or restrict the Trustees of the Trust.
- (b) The Advisory Board, if appointed, shall be elected annually by the Trustees at their organization meeting. Each member of the Advisory Board shall hold office until his death, resignation or removal or until his successor shall be elected and qualified.
- (c) The amount of compensation to be paid to the members of the Advisory Board shall be fixed from time to time by the Trustees. In addition to the foregoing, the Trustees may authorize the payment of expenses incurred by any member of the Advisory Board to attend any meeting and may also authorize the payment of additional compensation to any member of the Advisory Board for services actually rendered the Trust in addition to attending meetings.
- 3.11 Miscellaneous Powers. The Trustees shall have the power to: (a) employ or contract with such Persons as the Trustees may deem desirable for the transaction of the business of the Trust; (b) enter into joint ventures, partnerships and any other combinations or associations; (c) purchase, and pay for out of Trust Property, insurance policies insuring the Shareholdiers, Trustees, officers, employees, agents, investment advisors, or independent contractors of the Trust against all claims arising by reason of holding any such position or by reason of any action taken or omitted by any such Person in such capacity, whether or not constituting negligence, or whether or not the Trust would have the power to indemnify such Person against such liability; (d) establish pension, profit-sharing, share purchase, and other retirement, incentive and benefit plans for any Trustees, officers, employees and agents of the Trust; (e) make donations, irrespective of benefit to the Trust, for charitable, religious, educational, scientific, civic or similar purposes; (f) to the extent permitted by law, indemnify any Person with whom the Trust has dealings, including the Advisor, to such extent as the Trustees shall determine; (g) guarantee indebtedness or contractual obligations of others; (h) determine and change the fiscal year of the Trust and the method in which its accounts shall be kept; and (i) adopt a seal for the Trust but the absence of such seal shall not impair the validity of any instrument executed on behalf of the Trust.
- 3.12 Further Powers. The Trustees shall have power to do all such other things and execute all such instruments as they deem necessary, proper or desirable in order to promote the interests of the Trust although such things are not herein specifically mentioned. Any determination as to what is in the interests of the Trust made by the Trustees in good faith shall be conclusive. In construing the provisions of this Declaration, the presumption shall be in favor of a grant of power to the Trustees. The Trustees will not be required to obtain any court order to deal with the Trust Property.

ARTICLE IV

ADVISOR

4.1 General. Consistent with their ultimate responsibility for the general investment policy of the Trust and for the general supervision of the business of the Trust, the Trustees shall appoint an Advisor to present to the Trust a continuing and suitable investment program which is consistent with the Trust's investment policies and, to the extent deemed advisable by the Trustees, to administer the day-to-day operations of the Trust. The Trustees may delegate such authority to the Advisor, or to any other Person the services of whom are obtained by the Advisor, as the Trustees may, in their sole discretion, deem to be desirable, without regard to whether such authority is normally granted or delegated by Trustees.

Any agreement entered into with the Advisor shall provide that (a) the Advisor may engage in other activities including the rendering of advice to other investors and the management of other investments and (b) the Advisor shall not, without the prior written consent of a majority of the Trustees (including a majority of the Trustees who are not Affiliates of such Person), invest in nor for remuneration render advice or service to any Person other than the Trust in connection with any investment of a type which is included in the principal investment objectives of the Trust, except that the Advisor may, with respect to any loan or other investment in which the Trust may participate or allot a participation, render advice and service, with or without remuneration, to each and every participant in such loan or other investment. In addition, the Advisor may not act as investment advisor to another real estate investment trust one or more of the principal investment objectives of which coincide with one or more of the principal investment objectives of the Trust, as determined from time to time by the Trustees.

Any agreement entered into with the Advisor shall further provide that no holder of securities of the Advisor (including any such holder who is in control of the Advisor) shall be prohibited for any reason from transferring directly or indirectly all or any portion of such securities to another Person by sale, exchange or otherwise or shall be required to obtain the consent of the Trust or any of its Shareholders for such a transfer. Neither the Trust nor its Shareholders shall have or shall exercise any rights in or with respect to income or profits realized by any such security holder by reason of any such direct or indirect transfer; and, by purchasing Shares, each Shareholder shall be deemed to have consented to any such transfer and to have expressly and irrevocably waived any interest in or rights with respect to any such income or profits from a transfer of securities of the Advisor whether arising under the laws or regulations of the United States or any State or territory thereof or under any judicial decision at law or in equity.

ARTICLE V

INVESTMENTS

5.1 Statement of Investment Policy. The principal investment objective of the Trust, until modified by the Trustees, shall be to invest the assets of the Trust in Real Property and long-term Mortgage Loans of every type, with equity participations when available, in such proportions as the Trustees may deem advisable from time to time. The Trustees may also invest such assets in short and intermediate-term Mortgage Loans of every type. To the extent that the Trust has assets not so invested, the Trustees may invest such assets in (a) Securities, including shares of other real estate investment trusts; (b) deposits in commercial and savings banks and savings and loan banks or associations; and (c) other property, real or personal. The Trustees may issue commitments to make any of the investments described in this Article V. Investments of the Trust may be made in various combinations and may involve participations with other Persons and the utilization of such financing or investment techniques, now in use or hereafter devised, as the Trustees may deem desirable.

The Trustees shall have full power to vary the Trust's principal investment objectives to meet changing economic and other conditions consistent with the requirements of the REIT Provisions. It shall be the policy of the Trust to make investments in such a manner as to comply with the requirements of the REIT Provisions with respect to the composition of the Trust's investments and the derivation of its income except to the extent they may determine to allow the Trust's qualification under the REIT Provisions to lapse for one or more fiscal periods; but no Trustee, director, officer, employee or agent of the Trust or the Advisor shall be liable to any Person for any act or omission resulting in the loss of tax benefits under the Internal Revenue Code, except for any act or omission resulting from bad faith, willful misfeasance, gross negligence and reckless disregard of duties.

hold property primarily for sale to customers in the ordinary course of the trade or business of the Trust,

5.2 Restrictions. Notwithstanding anything in this Declaration of Trust which may be deemed to authorize the contrary, the Trustees shall not (a) invest in commodities, foreign currencies, bullion or chattels, except as required in the day-to-day business of the Trust or in connection with its investments; (b) invest in real estate contracts for sale (except ander circumstances where the investment of the Trust is substantially equivalent to a mortgagee's interest) in excess of a value of 1% of the Total Assets of the Trust; provided, however, that nothing in this Section shall prevent the holding of contracts of sale as security for loans made by the Trust and the acquismon and ownership of such contracts of sale upon foreclosure of, or realization upon, such security interests, and contracts of sale so held or owned shall be excluded from the computation required by this Section; (c) engage in any short sale; (d) hold equity Securities of any Person which to the knowledge of the Trustees is then holding investments or engaging in activities prohibited to the Trustees under this Section; provided, however, that the foregoing limitation shall not apply to equity Securicies acquired through foreclosure of a mortgage owned by the Trust or conveyed to the Trust in full or partial satisfaction of indebtedness owed to the Trust or acquired in connection with the making of a Mortgage Loan or an investment in Real Property; (e) engage in trading as compared with investment activities, or engage in the business of underwriting or agency distribution of Securities issued by others, but this prohibition shall not prevent the Trust from buying or selling Mortgage Loans, including participations therein, or interests in Real Property; (f) hold property primarily for sale to customers in the ordinary course of the trade or business of the Trust, but this prohibition shall not be construed to deprive the Trust of the power to sell any property which it owns at any time; (g) invest more than 10% of the Total Assets of the Trust in the ownership of, or participations in the ownership of, or in Mortgage Loans on, unimproved non-income-producing real property, excluding investments made or committed to be made prior to the effective date of a Registration Statement under the Securities Act of 1933 in connection with the first public offering of Securities of the Trust and property being developed or property which will be developed within a period deemed reasonable by the Trustees; (h) invest more than 1 % of the Total Assets of the Trust in Junior Mortgage Loans, excluding Wrap-Around Loans, loans to the extent made or acquired against a commitment, conditional or otherwise, from a recognized institutional lender for intermediate or long-term financing in an amount at least equal to the Trust's loan, loans on properties in which the Trust has an equity interest and loans made or committed to be made prior to the effective date of a Registration Statement under the Securities Act of 1933 in connection with the first public offering of Securities of the Trust.

ARTICLE VI

LIMITATIONS OF LIABILITY

6.1 Liability to Third Persons. No Shareholder shall be subject to any personal liability whatsoever, in tort, contract or otherwise, to any Person in connection with Trust Property or the affairs of the
Trust; and no Trustee, officer, employee or agent of the Trust shall be subject to any personal liability
whatsoever, in tort, contract or otherwise, to any Person in connection with Trust Property or the affairs
of the Trust, except for his own willful misconduct knowingly and intentionally committed in bad faith;
and all such other Persons shall look solely to the Trust Property for satisfaction of claims of any
nature arising in connection with the affairs of the Trust.

- 6.2 Liability to Trust or to Shareholders. No Trustee, officer, employee or agent of the Trust shall be liable to the Trust or to any Shareholder, Trustee, officer, employee or agent of the Trust for any action or failure to act (including failure to compel in any way any former or acting Trustee to redress any breach of trust) except for his own bad faith, willful misfeasance, gross negligence and reckless disregard of his duties.
- 6.3 Indemnification. The Trust shall indemnify and hold each Shareholder harmless from and against all claims and liabilities, whether they proceed to judgment or are settled or otherwise brought to a conclusion, to which such Shareholder may become subject by reason of his being or having been a Shareholder, and shall reimburse such Shareholder for all legal and other expenses reasonably incurred by him in connection with any such claim or liability. In case any claim is asserted against any Shareholder based on an act or omission of the Trust or otherwise because of his being or having been a Shareholder of the Trust, the Trust shall, upon notice thereof, assume the defense of such claim, including the employment of counsel and the payment of all expenses, and satisfy any judgment resulting therefrom. The rights accruing to a Shareholder under this Section shall not exclude any other right to which such Shareholder may be lawfully entitled, nor shall anything herein contained restrict the right of the Trust to indemnify or reimburse a Shareholder in any appropriate situation even though not specifically provided herein; provided, however, that the Trust shall have no liability to reimburse Shareholders for taxes assessed against them by reason of their ownership of Shares, nor for any losses suffered by reason of changes in the market value of Securities of the Trust.

The Trust shall indemnify each of its Trustees, officers, employees and agents (including those who serve at its request as directors, officers or trustees of another organization in which it has any interest as a shareholder, creditor or otherwise), against all liabilities and expenses, including amounts paid in satisfaction of judgments, in compromise or as fines and penalties, and counsel fees, reasonably incurred by him in connection with the defense or disposition of any action, suit or other proceeding by the Trust or any other Person, whether civil or criminal, in which he may be involved or with which he may be threatened, while in office or thereafter, by reason of his being or having been such a Trustee, officer, employee or agent, except with respect to any matter as to which he shall have been adjudicated not to have acted in good faith in the reasonable belief that his action was in the best interests of the Trust; provided, however, that as to any matter disposed of by a compromise payment by such Trusses offices. employee or agent, pursuant to a consent decree or otherwise, no indemnification either for said payers. or for any other expenses shall be provided unless the Trust shall have received a written opinion from independent counsel approved by the Trustees to the effect that if the foregoing matters had been adjudicated, they would likely have been adjudicated in favor of such Trustee, officer, employee or agent. The rights accruing to any Trustee, officer, employee or agent under these provisions shall not exclude any other right to which he may be lawfully entitled; provided, however, that no Trustee, officer, employee or agent may satisfy any right of indemnity or reimbursement granted herein or to which he may be otherwise entitled except out of the Trust Property, and no Shareholder shall be personally liable to any Person with respect to any claim for indemnity or reimbursement or otherwise. The Trustees may make advance payments in connection with indemnification under this Section, provided that the indemnified Trustee, officer, employee or agent shall have given a written undertaking to reimburse the Trust in the event it is subsequently determined that he is not entitled to such indemnification.

- 6.4 Surety Bonds. No Trustee shall, as such, be obligated to give any bond or surety or other security for the performance of any of his duties.
- 6.5 Apparent Authority. No Person dealing with the Trustees or any officer, employee or agent of the Trust shall be bound to make any inquiry concerning the validity of any transaction purporting to be made by the Trustees or by such officer, employee or agent or make inquiry concerning or be

liable for the application of money or property paid, loaned or delivered to or on the order of the Trustees or of such officer, employee or agent.

6.6 Recitals. Any written instrument creating an obligation of the Trust shall be conclusively taken to have been executed or done by a Trustee, officer, employee or agent of the Trust only in his capacity as Trustee under this Declaration or in his capacity as officer, employee or agent of the Trust. Any written instrument creating an obligation of the Trust shall refer to this Declaration and contain a recital to the effect that the obligations thereunder are not personally binding upon, nor shall resort be had to the private property of, any of the Trustees, Shareholders, officers, employees or agents of the Trust, but the Trust Property or a specific portion thereof only shall be bound, but the omission of such recital shall not operate to impose personal liability on any of the Trustees, Shareholders, officers, employees or agents of the Trust. The Trustees shall, at all times, maintain insurance for the protection of the Trust Property, its Shareholders, Trustees, officers, employees and agents in such amount as the Trustees shall deem adequate to cover all foreseeable tore liability to the extent available at reasonable rates.

ARTICLE VII

SHARES AND OTHER SECURITIES

- 7.1 Description of Shares. The interests of the Shareholders hereunder shall be divided into 10,000,000 Shares, each having a par value of \$1 per Share, all of which shall be fully paid and non-assessable by or on behalf of the Trust. The Trustees may issue such Shares from time to time for such consideration, whether cash or otherwise, as they deem appropriate, provided that no Shares shall entitle the holder thereof to the redemption thereof at the option of such holder. The Trustees may, by majority vote, increase the number of Shares which the Trust may issue, and any such shares shall thereafter be included in the term "Shares" for purposes of this Declaration. Notwithstanding the foregoing provisions of this Section 7.1 or any other provision contained in this Declaration, the Trustees shall not (a) issue "redeemable securities" as defined in Section 2(a)(32) of the Investment Company Act of 1940 or (b) issue options or warrants to purchase Securities of the Trust unless (i) issued to all holders of any class of Securities of the Trust ratably or (ii) as part of a public offering or financial arrangement (including issuance of options or warrants in exchange for property but excluding issuance of options or warrants in exchange for property but excluding issuance of options or warrants exercisable at a price which is less than the fair market value of the Securities at the time of such issuance) with Persons other than the Advisor or directors, trustees, officers or employees of the Trust or the Advisor. Ownership of Shares shall be evidenced by certificates.
- 7.2 Certificates. Every Shareholder shall be entitled to receive a certificate, in such form as the Trustees shall from time to time approve, specifying the number, class and series of Shares held by such Shareholder. Subject to Section 7.8 hereof, such certificates shall be treated as negotiable and title thereto and to the Shares represented thereby shall be transferred by delivery thereof to the same extent in all respects as a stock certificate, and the shares represented thereby, of a Massachusetts business corporation.

Each certificate evidencing Shares shall contain notice of the provisions contained in Section 7.5 hereof and a legend imprinted thereon to the following effect, or such other legend as the Trustees may from time to time adopt:

"If necessary to effect compliance by the Trust with certain requirements of the Internal Revenue Code, the shares represented by this certificate are subject to redemption by the Trustees of the Trust and the transfer thereof may be prohibited or rendered ineffective upon the terms and conditions set forth in the Declaration of Trust. The Trust will furnish a copy of such terms and conditions to the registered holder of this certificate upon request and without charge."

- 7.3 Fractional Shares. In connection with any issuance of Shares the Trustees may issue fractional Shares or may provide for the issuance of scrip.
- 7.4. Issuance of Warrants. Subject to Section 7.1 hereof, the Trustees, in their discretion, may from time to time issue to such persons as they may determine warrants to purchase Shares which shall entitle the holders thereof to subscribe to Shares at such times and on such terms as the Trustees may prescribe.
- 7.5 Rights of Shareholders. The ownership of the Trust Property of every description and the right to conduct any business hereinbefore described are vested exclusively in the Trustees, and the Shareholders shall have no interest therein other than the beneficial interest conferred by their Shares, and they shall have no right to call for any partition or division of any property, profits, rights or interests of the Trust nor can they be called upon to share or assume any losses of the Trust or suffer an assessment of any kind by virtue of their ownership of Shares. By purchasing Shares, each Shareholder shall be deemed to have consented to the provisions of the last paragraph of Article IV hereof permitting transfers of securities of any Advisor appointed by the Trustees and to have expressly and irrevocably waived any interest in or rights with respect to any income or profits realized by any Person from a transfer of securities of such Advisor, whether arising under the laws or regulations of the United States or any State or Territory thereof or under any judicial decision at law or in equity. The Shares shall be personal property giving only the rights in this Declaration specifically set forth. The Shares shall not entitle the holder to preference, preemptive, appraisal, conversion or exchange rights (except for rights of appraisal specified in Section 11.4).
- 7.6 Death of Shareholders. The death of a Shareholder during the continuance of the Trust shall not terminate this Declaration of Trust nor give such Shareholder's legal representatives a right to an accounting or to take any action in the courts or otherwise against other Shareholders or the Trustees or the Trust Property, but shall simply entitle the legal representatives of the deceased Shareholder to demand and receive, pursuant to the provisions of Section 8.4 hereof, a new certificate for Shares in place of the certificate held by the deceased Shareholder, and upon the acceptance thereof such legal representative shall succeed to all the rights of the deceased Shareholder under this Declaration.
- 7.7 Repurchase of Securities of the Trust. The Trustees may, on behalf of the Trust, purchase or otherwise acquire outstanding Securities of the Trust from time to time for such consideration and on such terms as they may deem proper. Shares so purchased or acquired by the Trustees shall not, so long as they belong to the Trust, receive distributions (other than, at the option of the Trustees, distributions in Shares) or be entitled to any voting rights. Such Shares may in the discretion of the Trustees be cancelled and the number of Shares issued thereby reduced or held in the treasury and disposed of as the Trustees may determine.
- 7.8 Redemption and Restriction on Transfer. If the Trustees shall, at any time and in good faith, be of the opinion that ownership of Securities of the Trust has or may become concentrated to an extent which may prevent the Trust from qualifying as a real estate investment trust under the REIT Provisions, the Trustees may, by means deemed equitable by them, prohibit the transfer of and/or call for redemption a number of Shares of the Trust sufficient, in their opinion, to maintain or bring the direct or indirect ownership thereof into conformity with the requirements for such a real estate investment trust. Any transfer shall be void if the Trustees have prohibited such transfer or if such transfer would cause the Trust to fail to qualify as a real estate investment trust under the REIT Provisions. The redemption price to be paid for Shares so called for redemption, on the date fixed for redemption shall be (i) the last reported sale price regular way of the Shares on the last trading day prior to the redemption date or, if there shall not have been a sale on such day, on the basis of the average of the bid and asked prices regular way, in either case on the principal national securities exchange on which the Shares are listed, (ii) if the Shares are not so listed, the average of the last bid and asked

prices on such day as reported by NASDAQ or a similar service or organization selected by the Trustees, or (iii) if not determinable as aforesaid, as determined in good faith by the Trustees. From and after the date fixed for redemption by the Trustees, the holder of any Shares so called for redemption shall cease to be entitled to any distributions, voting rights and other benefits with respect to such Shares, except only the right to payment of the redemption price fixed as aforesaid.

7.9 Information From Holders of Securities of the Trust. Holders of Securities of the Trust shall upon demand disclose to the Trustees in writing such information regarding actual and constructive ownership of Shares as the Trustees deem necessary to comply with the REIT Provisions or the provisions of any other applicable law.

ARTICLE VIII

RECORD AND TRANSFER OF SHARES

- 8.1 Share Register. A register shall be kept which shall contain the names and addresses of the Shareholders and the number of Shares held by them and the numbers of the certificates representing such Shares and a record of all transfers thereof. Only Shareholders whose certificates are recorded on such register shall be entitled to vote or to receive distributions or otherwise to exercise the rights of Shareholders.
- 8.2 Transfer Agent. The Trustees shall have power to employ one or more transfer agents or registrars. The transfer agent may keep the register and record therein the original issues and transfers of Shares and countersign certificates for Shares issued to the persons entitled thereto. Any such transfer agents and registrars shall perform the duties usually performed by transfer agents and registrars of certificates of stock in a corporation, except as modified by the Trustees.
- 8.3 Blank Certificates. Signed certificates for Shares in blank may be deposited with any transfer agent of the Trust, to be used by such transfer agent in accordance with author conferred upon it as occasion may require.
- 8.4 Owner of Record. Any person becoming entitled to any Shares by operation of law, shall be recorded as the holder of such Shares and receive a new certificate for the same upon production of the proper evidence thereof and delivery of the existing certificate to the Trustees or a transfer agent-of the Trust. But until such record is made, the Shareholder of record shall be deemed to be the holder of such Shares for all purposes hereof and neither the Trustees nor any transfer agent or registrar nor any officer or agent of the Trust shall be affected by any notice to the contrary.
- 8.5 Transfers of Shares. Shares shall be transferable on the records of the Trust (other than by operation of law) only by the record holder thereof or by his agent thereunto duly authorized in writing upon delivery to the Trust or a transfer agent of the Trust of the certificates therefor, with all transfer tax stamps affixed or duly provided for, properly endorsed or accompanied by duly executed instruments of transfer, together with such evidence of the genuineness of each such endorsement, execution and authorization and of other matters as may reasonably be required by the Trust or the transfer agent. Upon such delivery the transfer shall be recorded on the register of the Trust and a new certificate for the Shares so transferred shall be issued to the transferce. But until such record is made, the Shareholder of record shall be deemed to be the holder of such Shares for all purposes hereof and neither the Trustees nor the Trust nor any transfer agent or registrar nor any officer or agent of the Trust shall be affected by any notice of the proposed transfer. This Section 8.5 and Section 8.4 hereof are subject in all respects to the provisions of Section 7.8 hereof.
- 8.6 Limitation of Fiduciary Responsibility. The Trustees shall not, nor shall the Shareholders or any officer, transfer agent or other agent of the Trust, be bound to see to the execution of any trust, charge, pledge or equity to which any of the Shares are subject, or to inquire whether any transfer

of any Shares by any such Shareholder or his personal representatives is authorized by such trust, charge, pledge or equity, or to recognize any Person as having any interest therein except the Persons recorded as such Shareholders. The receipt of the Person in whose name any Share is recorded, or, if such Share is recorded in the names of more than one Person, the receipt of any one of such Persons or of the duly authorized agent of any such Person shall be a sufficient discharge for all property deliverable in respect of such Share and from all liability to see to the proper application thereof.

- 8.7 Notices. Any and all notices to which Shareholders hereunder may be entitled shall be deemed duly given if mailed, postage prepaid, addressed to Shareholders of record at their last known addresses as recorded on the Share register.
- 8.8 Replacement of Certificates. In case of the loss, mutilation or destruction of any certificate for Shares hereunder, the Trustees may issue or cause to be issued a new certificate on such terms as they may deem fit.

ARTICLE IX

SHAREHOLDERS AND DISTRIBUTIONS

- 9.1 Meetings of Shareholders.
- (a) Annual Meetings. Annual meetings of the Shareholders shall be held, commencing in 1973, at such place within or without The Commonwealth of Massachusetts on such day and at such time as the Trustees shall designate. The business transacted at such meeting shall include the election of Trustees and may include the transaction of such other business as Shareholders may be entitled to vote upon as hereinafter provided in this Article IX, or as the Trustees may determine. The holders of a majority of outstanding Shares present in person or by proxy shall constitute a quorum at any annual or special meeting.
- (b) Special Meetings. Special meetings of the Shareholders may be called at any time by a majority of the Trustees and shall be called by any Trustee upon written request of Shareholders holding in the aggregate not less than 20% of the outstanding Shares having voting rights, such request specifying the purpose or purposes for which such meeting is to be called. Any such meeting shall be held within or without the Commonwealth of Massachusetts on such day and at such time as the Trustees shall designate.
- 9.2 Notice of Meetings. Notice of all meetings of the Shareholders, stating the time, place and purposes of the meeting, shall be given by the Trustees by mail to each Shareholder at his registered address, mailed at least 10 days and not more than 60 days before the meeting. Only the business stated in the notice of the meeting shall be considered at such meeting. Any adjourned meeting may be held as adjourned without further notice.
- 9.3 Voting Rights of Shareholders. The Shareholders shall be entitled to vote only upon the following matters: (a) election of Trustees as provided in Section 2.2 or Section 2.4 hereof; (b) amendment of this Declaration or termination of the Trust as provided in Sections 11.2 and 11.3 hereof; and (c) merger or consolidation of the Trust or sale of substantially all of the assets of the Trust as provided in Section 11.4 hereof. Except with respect to the foregoing matters specified in this Section, no action taken by the Shareholders at any meeting shall in any way bind the Trustees. However, nothing in this Section shall prevent the Trustees from submitting to vote of Shareholders any matter which they deem appropriate.
- 9.4 Record Date for Meetings. For the purpose of determining the Shareholders who are entitled to notice of and to vote at any meeting, or to participate in any distribution, or for the purpose of any

other action, the Trustees may from time to time close the transfer books for such period, not exceeding 30 days, as the Trustees may determine; or without closing the transfer books the Trustees may fix a date not more than 60 days prior to the date of any meeting of Shareholders or dividend payment or other action as a record date for the determination of the Persons to be treated as Shareholders of record for such purposes.

- 9.5 Proxies, etc. At any meeting of Shareholders, any holder of Shares entitled to vote thereat may vote by proxy, provided that no proxy shall be voted at any meeting unless it shall have been placed on file with the Secretary, or with such other officer or agent of the Trust as the Secretary may direct, for verification prior to the time at which such vote shall be taken. Pursuant to a resolution of a majority of the Trustees, proxies may be solicited in the name of one or more Trustees or one or more of the officers of the Trust. Only Shareholders of record shall be entitled to vote and each full Share shall be entitled to one vote. Neither fractional Shares nor scrip issued in lieu of fractional Shares shall be entitled to any vote. When any Share is held jointly by several persons, any one of them may vote at any meeting in person or by proxy in respect of such Share, but if more than one of them shall be present at such meeting in person or by proxy, and such joint owners or their proxies so present disagree as to any vote to be cast, such vote shall not be received in respect of such Share. A proxy purporting to be executed by or on behalf of a Shareholder shall be deemed valid unless challenged at or prior to its exercise, and the burden of proving invalidity shall rest on the challenger. If the holder of any such Share is a minor or a person of unsound mind, and subject to guardianship or to the legal control of any other person as regards the charge or management of such Share, he may vote by his guardian or such other person appointed or having such control, and such vote may be given in person or by proxy.
- 9.6 Reports. The Trustees shall cause to be prepared at least annually a report of operations containing a balance sheet and statement of income and undistributed income of the Trust prepared in conformity with generally accepted accounting principles and an opinion of an independent public accountant on such financial statements. Copies of such reports shall be mailed to all Shareholders of record within 120 days of the period covered by the report, and in any event within a reasonable period preceding the annual meeting of Shareholders. The Trustees shall, in addition, furnish to the Shareholders, promptly after the end of each of the first three quarterly periods of every fiscal year, an interim report containing an unaudited balance sheet of the Trust as at the end of such quarterly period and an unaudited statement of income and surplus for the period from the beginning of the current fiscal year to the end of such quarterly period.
- 9.7 Distributions to Shareholders. The Trustees may from time to time declare and pay to the Shareholders, in proportion to their respective ewnership of Shares, or in accordance with the respective rights of each class or series of Shares, out of the earnings, profits or surplus (including paid-in capital), capital or assets in the hands of the Trustees, and in cash, Securities of the Trust or assets of the Trust, such distributions as they see fit. The declaration and payment of such distributions and the determination of earnings, profits, surplus (including paid-in capital) and capital available therefor shall lie wholly in the discretion of the Trustees and no Shareholder shall be entitled to receive any distribution except as determined by the Trustees. The Trustees may also distribute to the Shareholders in proportion to their respective ownership of Shares additional Shares in such manner and on such terms as they may deem proper.
- 9.8 Source of Distributions. All distributions to Shareholders shall be accompanied by a statement in writing advising the Shareholders of the source of the funds so distributed so that distributions of ordinary income, return of capital, and capital gains income will be clearly distinguished, or, if the source of funds so distributed has not been determined, the communication shall so state, in which event the statement of the source of funds shall be forwarded to Shareholders promptly after the close of the fiscal year in which the distribution was made.

- 9.9 Inspection of Records. The records of the Trust shall be open to inspection by Shareholders to the same extent as is permitted shareholders of a Massachusetts business corporation.
- 9.10 Shareholder Action by Il'ritten Consent. Any action which may be taken by Shareholders may be taken without a meeting if a majority of Shareholders entitled to vote on the matter (or such larger proportion thereof as shall be required by any express provision of this Declaration) consent to the action in writing and the written consents are filed with the records of the meetings of Shareholders. Such consent shall be treated for all purposes as a vote taken at a meeting of Shareholders.

ARTICLE X

TRANSACTIONS WITH RELATED PERSONS

- 10.1 Transactions with Related Persons, Etc. (a) Notwithstanding any other provisions of this Declaration of Trust, the Trustees shall not knowingly, directly or indirectly, lend any of the Trust assets to, purchase or otherwise acquire any property whatsoever (other than Securities of the Trust issued for cash or services) from, sell or otherwise transfer any property whatsoever (other than Securities of the Trust issued for cash or services) to, contract with, or pay any commission or other remuneration, directly or indirectly, in connection with the purchase or sale of Trust assets to (i) any Trustee, or any director, officer, partner or employee (acting in their individual capacities) of the Trust or of the Advisor; (ii) any trustee, director, officer or partner (acting in their individual capacities) of any person which is an Affiliate of the Advisor by reason of (A) owning beneficially, directly or indirectly, 5% or more of the outstanding capital stock, shares or other equity interest of the Advisor, or (B) being a Subsidiary of another person of which the Advisor is also a Subsidiary; (iii) the Advisor; (iv) any person of which any Trustee, or any director, officer, partner or employee of the Trust or of the Advisor is an Affiliate by reason of being a trustee, director, officer, partner or direct or indirect beneficial owner of 5% or more of the outstanding capital stock, shares or other equity interest of such person; or (v) C. I. Mortgage Group or its successors or any other person which is affiliated with the Advisor by reason of (A) owning beneficially, directly or indirectly, 5% or more of the outstanding capital stock, shares or other equity interest of the Advisor, (B) being a Subsidiary of another person of which the Advisor is also a Subsidiary, (C) having 5% or more of its outstanding capital stock, shares or other equity interest owned beneficially, directly or indirectly, by the Advisor, or (D) the Advisor's acting as trustee, director, officer or partner of such Persons; unless, in each such case, after disclosure of such interest or affiliation, such transaction is approved by a majority of the Trustees, including a majority of the Trustees who are not affiliated with the Advisor and who are not interested in the transaction and such Trustees determine that such transaction is on terms fair and reasonable to the Trust and its Shareholders and in no event less favorable to the Trust than terms available for a comparable transaction with unrelated persons. If any transaction subject to this provision is an acquisition by the Trust of an equity interest in Real Property, the transaction must also be at a price not exceeding the fair value of such interest as determined by independent appraisal.
- (b) The Trust shall not, without the consent of the holders of a majority of the Shares, knowingly make any loans to, or acquire any loans or participations in loans or any other property or assets from, or sell or transfer any assets or property of the Trust to (in either case except Shares and other Securities of the Trust issued for each or services), the Advisor or any Affiliate of the Advisor (including City Investing Company, a Delaware corporation, and any of its subsidiaries or Affiliates but excluding C. I. Mortgage Group and its successors).
- (c) The Trustees are entitled to rely in good faith on certificates of (i) Trustees, officers and employees of the Trust with respect to their interests in any transaction, and (ii) duly authorized representatives of the Advisor with respect to the identities and interests in any transaction of all other persons referred to in such provision.

- (d) The simultaneous acquisition by the Trust and the Advisor or any Affiliate of the Advisor of participations in a loan or other investment will not be deemed to constitute an acquisition or sale of property by one of them to the other, provided that the terms (other than the size of the participation) are not less favorable to the Trust than to such other person.
- (e) There shall be no restriction on transactions between the Trust and any Affiliate of the Trust, of any Trustee, officer or employee of the Trust, of the Advisor or of any director, officer or employee of the Advisor with regard to (i) the initial investments of the Trust described in its Registration Statement with respect to the first public offering of Securities of the Trust at the time such Registration Statement becomes effective under the Securities Act of 1933 or (ii) purchases or sales of Securities of the Trust on the same terms then being offered to all holders of any class of Securities of the Trust or to the public.
- (f) The Trust may make investments where an Affiliate of the Trust has a commitment to provide subsequent financing and may make investments in Real Property on which an Affiliate holds an existing Mortgage or other encumbrance, provided, however, that in the case of any such transaction in which the Affiliate involved is C. I. Mortgage Group, the investment shall have been approved by a majority of the Trustees who are not Affiliates of C. I. Mortgage Group and such Trustees shall have determined that such transaction is on terms fair and reasonable to the Trust and its Shareholders and in no event less favorable to the Trust than terms acceptable for a comparable transaction with unrelated Persons.
- (g) Except as otherwise provided by this Declaration of Trust and in the absence of fraud, a contract, act or other transaction, between the Trust and any other person specified in this Section 10.1 or in which the Trust is interested, shall be valid and shall be deemed not to violate cap ctatutory, equitable or common law restrictions which might otherwise be applicable to self-dealing or transactions between related parties, and no Trustee, officer, employee or agent of the Trust shall have any liability as a result of entering into any such contract, act or other transaction, provided that no provision of this Section 10.1 is violated in connection therewith.
- (h) Any Trustee, officer, employee or agent of the Trust may own Securities of the Trust, for his individual account, and may exercise all rights of a holder of such Securities. The Trustees shall use their best efforts to obtain through the Advisor or other Persons a continuing and suitable investment program, consistent with the investment policies and objectives of the Trust, and the Trustees shall be responsible for reviewing and approving or rejecting investment opportunities presented by the Advisor or such other Persons. So long as there is an Advisor or such other Person, the Trustees shall have no responsibility for the origination of investment opportunities for the Trust. Any Trustee, officer, employee, or agent of the Trust may have business interests and engage in business activities in addition to those relating to the Trust, which interests and activities may be similar to those of the Trust and include the acquisition or disposition of interests in Real Property and Mortgage Loans, and each Trustee, officer, employee and agent of the Trust shall be free of any obligation to present to the Trust any investment opportunity which comes to him in any capacity other than solely as Trustee, officer, employee or agent of the Trust, even if such opportunity is of a character which, if presented to the Trust, could be taken by the Trust. Notwithstanding the foregoing, no Trustee, Advisor, officer, employee or agent of the Trust shall compete with the Trust in (i) any transaction in which the Trust is engaged or (ii) any proposed transaction which has been presented to the Trustees in writing for their consideration and which has not been rejected by the affirmative vote of a majority of the Trustees not interested in such proposed transaction. Any Trustee, officer, employee or agent of the Trust may be interested as trustee, officer, director, stockholder, partner, member, advisor or employee of, or otherwise have a direct or indirect interest in, any Person who may be engaged to render advice or services to the Trust, and may receive compensation from such Person as well as compensation as Trustee, officer, employee or agent of the Trust or otherwise hereunder. None of the activities referred to in this paragraph shall be deemed to conflict with his duties and powers as Trustee, officer, employee or agent of the Trust.

ARTICLE XI

DURATION, TERMINATION, AMENDMENT OF TRUST; MERGERS, ETC.

11.1 Duration. Subject to possible termination in accordance with the provisions of Section 11.2 hereof, the Trust created hereby shall continue until the expiration of 20 years after the death of the last survivor of the initial Trustees named herein and the following named persons:

| Name | Address | Date of Birth |
|---------------------------|--------------------------------------|-------------------|
| William Akin Kaynor, Jr | 1160 Park Avenue, New York, N. Y. | October 7, 1967 |
| Robert Moullin Kaynor | 1160 Park Avenue, New York, N. Y. | December 14, 1970 |
| Hugh Patrick Milmoe | 2084 Pacific Blvd., | |
| | Atlantic Beach, N. Y. | July 16, 1968 |
| Caroline Milmoe | 2084 Pacific Blvd., | |
| | Atlantic Beach, N. Y. | November 24, 1966 |
| Mary Kaye Milinoe | 2084 Pacific Blvd., | |
| | Atlantic Beach, N. Y. | July 21, 1965 |
| James Wallace Hopkins III | 206 Loring Avenue, Pelham, N. Y. | March 19, 1955 |
| John Matthews Hopkins | 206 Loring Avenue, Pelham, N. Y. | March 22, 1957 |
| Robert Hynson Hopkins | 206 Loring Avenue, Pelham, N. Y. | February 20, 1959 |
| Lelia Payne Hopkins | 206 Loring Avenue, Pelham, N. Y. | September 2, 1961 |
| Emily Marshall Hopkins | 206 Loring Avenue, Pelham, N. Y. | October 12, 1964 |
| Colin Emile Harley, Jr | 70 East 96th Strcet, New York, N. Y. | April 21, 1967 |
| | | |

11.2 Termination of Trust.

- (a) The Trust may be terminated by the affirmative vote of the holders of not less than two-thirds of the Shares, at any meeting of Shareholders or by an instrument in writing, without a meeting, signed by a majority of the Trustees and the holders of not less than two-thirds of such Shares. Upon the termination of the Trust:
 - (i) The Trust shall carry on no business except for the purpose of winding up its affairs.
 - (ii) The Trustees shall proceed to wind up the affairs of the Trust and all of the powers of the Trustees under this Declaration shall continue until the affairs of the Trust shall have been wound up, including the power to fulfill or discharge the contracts of the Trust, collect its assets, sell, convey, assign, exchange, transfer or otherwise dispose of all or any part of the remaining Trust Property to one or more persons at public or private sale for consideration which may consist in whole or in part of cash, securities or other property of any kind, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business; provided that any sale, conveyance, assignment, exchange, transfer or other disposition of all or substantially all the Trust Property shall require approval of the principal terms of the transaction and the nature and amount of the consideration by vote or consent of the holders of a majority of the Shares entitled to vote.
 - (iii) After paying or adequately providing for the payment of all liabilities, and upon receipt of such releases, indemnities and refunding agreements, as they deem necessary for their protection, the Trustees may distribute the remaining Trust Property, in cash or in kind or partly each, among the Shareholders according to their respective rights.
- (b) After termination of the Trust and distribution to the Shareholders as herein provided, a majority of the Trustees shall execute and lodge among the records of the Trust an instrument in writing setting forth the fact of such termination, and the Trustees shall thereupon be discharged from all further liabilities and duties hereunder, and the rights and interests of all Shareholders shall thereupon cease.

11.3 Amendment Procedure.

(a) This Declaration may be amended by the affirmative vote of the holders of not less than a majority of the Shares at any meeting of Shareholders or by an instrument in writing, without a meeting, signed by a majority of the Trustees and the holders of not less than a majority of such Shares.

The Trustees may also amend this Declaration without the vote or consent of Shareholders if they deem it necessary to conform this Declaration to the requirements of the REIT Provisions of the Internal Revenue Code or to other applicable federal laws or regulations, but the Trustees shall not be liable for failing so to do.

(b) No amendment may be made, under Section 11.3(a) above, which would change any rights with respect to any Shares of the Trust by reducing the amount payable thereon upon liquidation of the Trust or by diminishing or eliminating any voting rights pertaining thereto, except with the vote or consent of the holders of two-thirds of the Shares. Nothing contained in this Declaration shall permit the amendment of this Declaration to impair the exemption from personal liability of the Shareholders, Trustees, officers and agents of the Trust or to permit assessments upon Shareholders.

(c) A certification in recordable form signed by a majority of the Trustees setting forth an amendment and reciting that it was duly adopted by the Shareholders or by the Trustees as aforesaid or a copy of the Declaration, as amended, in recordable form, and executed by a majority of the Trustees, shall be

conclusive evidence of such amendment when lodged among the records of the Trust.

Notwithstanding any other provision hereof, until such time as a Registration Statement under the Securities Act of 1933, as amended, covering the first public offering of Securities of the Trust shall have become effective, this Declaration of Trust may be terminated or amended in any respect by the affirmative vote of a majority of the Trustees or by an instrument signed by a majority of the Trustees.

- 11.4 Merger, Consolidation and Sale of Assets. The Trust may merge or consolidate with any other corporation, association, trust or other organization or may sell, lease or exchange all or substantially all of the Trust Property, including its good will, upon such terms and conditions and for such consideration when and as authorized at any meeting of Shareholders called for the purpose by the affirmative vote of the holders of not less than two-thirds of the Shares, or by an instrument or instruments in writing without a meeting, signed by the holders of not less than two-thirds of such Shares and any such merger, consolidation, sale, lease or exchange shall be deemed for all purposes to have been accomplished under and pursuant to the statutes of The Commonwealth of Massachusetts. In respect of any such merger, consolidation, sale or exchange of assets, any Shareholder shall be entitled to rights of appraisal of his Shares to the same extent as a shareholder of a Massachusetts business corporation in respect of a merger, consolidation, sale or exchange of assets of a Massachusetts business corporation, and such rights shall be his exclusive remedy in respect of his dissent from any such action.
- 11.5 Incorporation. With the approval of the holders of a majority of the shares, the Trustees may cause to be organized or assist in organizing a corporation or corporations under the laws of any jurisdiction or any other trust, partnership, association or other organization to take over all of the Trust property or to carry on any business in which the Trust shall directly or indirectly have any interest, and to sell, convey and transfer the Trust property to any such corporation, trust, association or organization in exchange for the shares or securities thereof or otherwise, and to lend money to, subscribe for t'ie shares or securities of, and enter into any contracts with any such corporation, trust, partnership, association or organization, or any corporation, partnership, trust, association or organization in which the Trust holds or is about to acquire shares or any other interest. The Trustees may also cause a merger or consciention between the Trust or any successor thereto and any such corporation, trust, partnership, association or other organization if and to the extent permitted by law, provided that under the law then in effect, the federal income tax benefits available to Real Estate Investment Trusts, or substantially similar benefits, are also available to such corporation, trust, partnership, association or organization. Nothing contained herein shall be construed as requiring approval of shareholders for the Trustees to organize or assist in organizing one or more corporations, trusts, partnerships, associations or other organizations and selling, conveying or transferring a portion of the Trust Property to such organizations or entities, provided that the status of the Trust under the REIT Provisions is not adversely affected.

ARTICLE XII

MISCELLAMEOUS

12.1 Filing. This Declaration and any amendment hereto shall be filed in the office of the Secretary of The Commonwealth of Massachusetts and in such other places as may be required under the laws of Massachusetts and may also be filed or recorded in such other places as the Trustees deem

appropriate. Each amendment so filed shall be accompanied by a certificate signed and acknowledged by a Trustee stating that such action was duly taken in a manner provided herein, and unless such amendment or such certificate sets forth some earlier or later time for the effectiveness of such amendment, such amendment shall be effective upon its filing. An amended Declaration, containing the original Declaration and all amendments theretofore made, may be executed from time to time by a majority of the Trustees and shall, upon filing with the Secretary of the Commenwealth of Massachusetts, be conclusive evidence of all amendments contained therein and may thereafter be referred to in lieu of the original Declaration and the various amendments thereto.

- 12.2 Governing Law. This Declaration is executed by the Trustees and delivered in the Commonwealth of Massachusetts and with reference to the laws thereof, and the rights of all parties and the validity and construction of every provision hereof shall be subject to and construed according to the laws of said State.
- 12.3 Counterparts. This Declaration may be simultaneously executed in several counterparts, each of which shall be deemed to be an original, and such counterparts, together, shall constitute one and the same instrument, which shall be sufficiently evidenced by any such original counterpart.
- 12.4 Reliance by Third Parties. Any certificate executed by an individual who, according to the records of the Trust, or of any recording office in which this Declaration may be recorded, appears to be a Trustee hereunder, certifying to: (a) the number or identity of Trustees or Shareholders. (b) the due authorization of the execution of any instrument or writing, (c) the form of any vote passed at a meeting of Trustees or Shareholders, (d) the fact that the number of Trustees or Shareholders present at any meeting or executing any written instrument satisfies the requirements of this Declaration. (e) the form of any Trustees' Regulations adopted by or the identity of any officers elected by the Trustees, or (f) the existence of any fact or facts which in any manner relate to the affairs of the Trust, shall be conclusive evidence as to the matters so certified in favor of any person dealing with the Trustees and their successors.
- 12.5 Provisions in Conflict With Law or Regulations. (a) The provisions of this Declaration are severable, and if the Trustees shall determine, with the advice of counsel, that any of such provisions is in conflict with the REIT Provisions or with other applicable laws and regulations, the conflicting provision shall be deemed never to have constituted a part of this Declaration; provided, however, that such determination shall not affect any of the remaining provisions of this Declaration or render invalid or improper any action taken or omitted prior to such determination.
- (b) If any provision of this Declaration shall be held invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall attach only to such provision in such jurisdiction and shall not in any manner affect such provision in any other jurisdiction or any other provision of this Declaration in any jurisdiction.

IN WITNESS WHEREOF, the undersigned have caused these presents to be executed as of the day and year first above written.

| | | | • | • | • | • | • | • | • | • | | • | • | | | • | • | • | • | • | | • | • | • | • | • | • | • | • | • | | • | • | | | | • | • | • |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | • | | • | • | | • | | • | | | | | | | • | | | • | | | | | | | | | | | | | | | | | | | • |
| | | | • | • | | | • | | | • | | | | • | | | | • | • | | | | | | • | | | | | | | • | | | | | | | |
| | | | | | • | | b | | | | | • | | • | | | | | | | | | | • | | | | | | | | | | | | | | | |
| | • | • | | | | | | | | • | • | | | | • | | | | | | • | | | | | | | | | | | | | | | | | | |
| | | | | | | • | | | | • | | | | | | | | • | | | | | | | | | | | | | | | | | | | | | |
| | • | | • | | • | | | | | | • | | | • | | | | | | | | | | | • | | | | | | | | | | | | | | |
| | • | • | • | | | • | • | • | • | • | | | | | • | | | | | | • | | | | | | | | | | | , | | • | | | | | |
| | | • | • | | • | • | | | | • | | • | | | | • | : | | • | | | | | | • | | | | | | | | | | | • | | | • |
| | • | | • | • | • | • | • | • | • | • | • | • | • | • | | • | | • | | • | • | : | | | • | • | | • | • | | • | | • | • | • | • | | | |
| - | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

| STATE O | FN | EW Y | ORK | 1 |
|---------|----|------|------|--------|
| STATE O | OF | New | York | } ss.: |

There personally appeared Peter C. R. Huang, James V. Tomai, Jr., John L. Gibbons, William L. Lyon, Robert M. Morgan, William Polk Carey, Gerald Oestreicher, William S. Renchard and James R. Webb who executed and, respectively, acknowledged the foregoing to be the free act and deed of each of them, before me, this third day of April, 1972.

| | ••••• |
|---|--|
| COMMONWEALTH OF MASSACHUSETTS COUNTY OF | |
| There personally appeared | who executed and deed, before me, this |
| | |
| | |
| STATE OF | |
| There personally appeared | deed, before me, this who executed and |
| | |
| STATE OF | |
| There personally appeared | deed, before me, this |
| · · · | ••••• |

C. I. REALTY INVESTORS

Amendment Dated and Effective as of Dacember 11, 1973 to Declaration of Trust Dated as of November 10, 1971 As Amended as of April 3, 1972 of C. I. Realty Investors

The undersigned constituting a majority of the Trustees now in office of C. I. Realty Investors, a Trust with transferable shares established under the laws of the Commonwealth of Massachusetts pursuant to a Declaration of Trust dated as of November 10, 1971, and filed with the Secretary of the Commonwealth of Massachusetts and with the Office of the City Clerk, City of Boston, Massachusetts and recorded with the Suffolk County Registry of Deeds, Book 8492, Page 308, and amended as of April 3, 1972, filed as aforesaid and recorded in said Suffolk Deeds, Book 8524, Page 416, do hereby certify and state under oath that this Amendment effective as of the date upon which the Trust's Shares of Beneficial Interest were listed upon the New York Stock Exchange, to wit December 11, 1973, has been duly adopted by a majority of the Trustees and by the holders of a majority of the outstanding Shares of Beneficial Interest of C. I. Realty Investors and that said Declaration of Trust, as amended, is hereby further amended in the following manner: Section 7.1 of Article VII is hereby amended by deleting the word "or" immediately preceding subsection (ii) of the fourth sentence thereof, adding the word "issued" as the first word of subsection (ii), and adding immediately following subsection (ii) the material that appears as subsection (iii) below, so that the entire Section 7.1 reads as follows:

"7.1 Description of Shares. The interests of the Shareholders hereunder shall be divided into 10,000,000 Shares of Beneficial Interest, each having a par value of \$1 per Sharc, all of which shall be fully paid and nonassessable by or on behalf of the Trust. The Trustees may issue such Shares from time to time for such consideration, whether cash or otherwise, as they deem appropriate, provided that no Shares shall entitle the holder thereof to the redemption thereof at the option of such holder. The Trustees may, by majority vote, increase the number of Shares which the Trust may issue, and any such Shares shall thereafter be included in the term 'Shares' for purposes of this Declaration. Notwithstanding the foregoing provisions of this Section 7.1 or any other provision contained in this Declaration, the Trustees shall not (a) issue 'redeemable securities' as defined in Section 2(a)(32) of the Investment Company Act of 1940 or (b) issue options or warrants to purchase Securities of the Trust unless (i) issued to all holders of any class of Securities of the Trust ratably; (ii) issued as part of a public offering or . financial grrangement (including issuance of options or warrants in exchange for property but excluding issuance of options or warrants exercisable at a price which is less than the fair market value of the Securities at the time of such issuance) with Person's other than the Advisor or directors, trustees, officers or employees of the Trust or the Advisor; or (iii) issued to officers or employees of the Trust or to the Advisor or to officers or employees of the Advisor solely in connection with a stock option plan or similar incentive compensation plan, provided, however, that no such

option or warrant shall be exercisable at a price which is less than the fair market value of such Shares at the time of issuance of such option or warrant and that no such option or warrant shall be issued unless at the time of proposed issuance the total number of such Shares subject to purchase under all then outstanding options and warrants that theretofore have been issued under this clause (iii), together with the number of such Shares subject to issuance under the proposed option or warrant, do not exceed five per cent (5%) of the total number of Shares outstanding at such time. Ownership of Shares shall be evidenced by certificates."

IN WITNESS WHEREOF, the undersigned have signed and sealed these presents, in each case as Trustee and not individually, as of December 11, 1973.

Trusted

MAUA!

Trustee

Trustee

when

22 45 65 6

manataga

| Skal Sim |
|------------------|
| (T)ustee |
| in The Chillen |
| Trustee |
| A/Culsoc |
| / Trustee |
| What In Tuongan |
| Trustee |
| Witham A. L. (-) |
| Trustee // |
| |
| Trustee |
| |
| |

| 1 | dhja | |
|----|--|--------------|
| 2 | UNITED STATES DISTRICT COURT | |
| 3 | SOUTHERN DISTRICT OF NEW YORK | |
| 4 | x | |
| 5 | DAVID and DOROTHY STEINBERG, on behalf : of themselves and all others similarly | |
| 6 | situated, Plaintiffs, | |
| 7 | · · | 75 Civ. 1695 |
| 8 | | |
| 9 | WILLIAM POLK CAREY, JOHN L. GIBBONS, ROBERT M. MORGAN, | |
| 10 | WILLIAM S. RENCHARD, : FRED R. SULLIVAN, : | |
| 11 | JAMES R. WEBB, : PETER C. R. HUANG, | |
| 12 | JAMES V. TOMAI, JR., C. I. REALTY INVESTORS, | |
| 13 | C. I. REALTY INVESTORS, CITY INVESTING COMPANY, C. I. PLANNING CORPORATION, | |
| 14 | REYNOLDS SECURITIES, INC., and : DUPONT GLORE FORGAN INCORPORATED, | |
| 15 | Defendants. | |
| 16 | x | |
| 17 | IRVING MASON, on behalf of himself and : | |
| 18 | all others similarly situated, and derivatively on behalf of C. I. : REALTY INVESTORS, | |
| 19 | Plaintiff, | |
| 20 | v. : | 75 Civ. 1811 |
| 21 | CITY INVESTING COMPANY, C. I. REALTY : INVESTORS, C. I. PLANNING CORPORATION, | |
| 22 | WILLIAM POLK CAREY, JOHN L. GIBBONS, : PETER C. R. HUANG, JAMES V. TOMAI, JR., | |
| 23 | ROBERT M. MORGAN, WILLIAM S. RENCHARD, : FRED R. SULLIVAN, JAMES R. WEBB, | |
| 24 | REYNOLDS SECURITIES INC., and PEAT, : MARWICK, MITCHELL & CO., | |
| 25 | Defendants. : | |

HON. INZER B. WYATT,

District Judge

New York, March 19, 1976 Room 318 - 2:30 p.m.

APPEARANCES:

H. LADDIE MONTAGUE, JR., ESQ., PAUL J. MC MAHON, ESQ.

Attorneys for Plaintiffs Steinberg; -and-

REMBAR, WOLF & CURTIS, ESQS., Attorneys for Plaintiffs Mason and Steinbergs; BY: FRANK R. CURTIS, ESQ., of Counsel.

RICHARD D. GREENFIELD, P.C. Attorney for Plaintiff Mason; BY: RICHARD D. GREENFIELD, ESQ., of Counsel.

DAVIS POLK & WARDWELL, ESOS., Attorneys for Defendants City Investing Company, C. I. Realty Investors, C. I. Planning Corporation, John L. Gibbons, Peter C. R. Huang, James V. Tomai, Jr., William S. Renchard, and Fred R. Sullivan;

BY RICHARD E. NOLAN, ESQ. MARK L. AUSTRIAN, ESQ. OGDEN N. LEWIS, ESQ., of Counsel.

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, ESQS., Attorneys for Defendant Reynolds Securities, INC.; BY: HUGH N. FRYER, ESQ. WEAVER H. GAINES, JR., ESQ., JEFFREY EVAN LIVINGSTON, ESQ., M. PAT ADAMSKI, ESQ., of Counsel.

23

13

14

15

16

17

18

19

20

21

22

24

THE COURT: Let's take Mason first.

I assume that counsel are aware that motions which had been made by Peat, Marwick, Mitchell are now withdrawn, because by stipulation that defendant or those defendants are out of the case.

In the Mason action, I understand that the motion for a class action determination is not on the calendar for today, so that it out of the way.

But we do have a motion by Davis, Polk and Dewey, Ballentine; I guess it's for a stay and to dismiss two of the counts for two grounds: One is that the plaintiff has failed to make a proper demand on the share-holders; and the other is that the plaintiff cannot maintain a class action and a derivative action at the same time.

Let's take first the motion to dismiss the two counts of the amended complaint, the derivative counts, Counts 4 and 5, and I don't need to hear from the movants. Let's hear from the plaintiff because I think the motion has to be granted. So let's give you a chance to tell me why not.

MR. GREENFIELD: Your Honor, Richard Greenfield speaking on behalf of plaintiff, Irving Mason.

THE COURT: Yes, Mr. Greenfield.

MR. GREENFIELD: I think the leading cases upon which you or the defendants relay, and I have the impression that your Honor has relied in the past, are the Brody case and before that, two Massachusetts cases, the Soloment Trust case and the Pommerantz case.

THE COURT: That's right.

MR. GREENFIELD: At least as to the question of the necessity of making a demand upon the shareholders, I find that even under Massachusetts law, under both Solomont and Pommerantz cases, there is --

THE COURT: I thought it was something against Landgrun; Greenspun against Lindley. That was, of course, an Appellate Division case here.

MR. GREENFIELD: Yes.

THE COURT: I guess the Massachusetts cases are the ones you cite. I agree. All right. It's hard to keep them straight.

MR. GREENFIELD: Our position, your Honor, is that at least under State law, if State law is to be applied, and therefore we would apply the Massachusetts law, we look to what that law is and to those two cases, the Solomont Trust case, which is quoted on page 19 of the defendants' brief, and the Pommerantz opinion, a portion of which is quoted on page 20 of their brief; and I am referring

to their initial brief.

I maintain that under the Massachusetts law there is still room, giving a fair weighing of all the equities, for a plaintiff to institute a derivative action on behalf of a trust or a coproration without making a demand on the shareholders.

I would like to quote the very language which the defendants quote in their brief, and I believe it is on page 19 --

THE COURT: Didn't I go through all this in that case involving the Equitable Life Assurance Society?

MR. GREENFIELD: I don't think so, your Honor. With all due respect, it's no reflection on the counsel for the plaintiff in that action, but I don't think they relied as heavily enough on Massachusetts law as they were entitled to.

THE COURT: You can be sure that I didn't limit myself to what plaintiff relied on. I don't sit up here like a jack-in-the-box. I spend some time on these matters.

MR. GREENFIELD: I'm well aware of that, your Honor, and I, needless to say, credit your opinion very carefully before making any argument and taking any dispute with it.

Nevertheless, I still have to go back to the language of those two cases in the possibility of getting your Honor's consideration for our position in this case.

The relevant language that I would like to quote again is, and this is from the Soloment case, "It is only from actual necessity, in order to prevent a failure of justice, that a suit in equity for the benefit of a corporation can be maintained by a stockholder." And that's without making the demand that we talked about.

Certainly in a case such as this, where we have perhaps 8,000 shareholders of record and maybe 16,000 beneficial shareholders, that there will be a failure of justice if Mr. Mason has to in some way approach those 8,000 shareholders to --

THE COURT: Isn't it written in the certificate of incorporation?

MR. GREENFIELD: I'm sorry.

THE COURT: I mean, doesn't the certificate

of incorporation itself say that there has to be a demand
on shareholders?

MR. GREENFIELD: I don't recall, sir.

THE COURT: Do the defendants know?

MR. AUSTRIAN: May it please the Court, my name

is Mark Austrian, representing the trust.

I don't believe that the certificate of incorporation specifically says that shareholder demand is required. It does say that the law of Massachusetts is to govern the trusts in all respects.

THE COURT: Do we have my opinion in the Equitable case down here?

MR. GREENFIELD: Your Honor, I have a copy, but unfortunately it's marked up.

THE COURT: Maybe --

MR. AUSTRIAN: Your Honor, I believe we do.

THE COURT: Whether it's marked up or not, it will save me sending upstairs for one.

(Pause.)

THE COURT: Well, in the Equitable case, as I thought, the declaration of trust specifically authorizes the shareholders to vote as to whether or not a court action proceeding or claim should be brought or maintained derivatively.

Now, I understand the defendants to say that the provision in the Equitable case is not present here?

MR. AUSTRIAN: No, your Honor, it is not, not

in that specific language.

THE COURT: Well, that may make a difference.

I don't know. But to say, then, that the Jones case is indistinguishable from the instant case, as the defendant's say, strikes me as drawing too long a bow. It is distinguishable.

In the Jones case, there was a specific provision in the declaration of trust, and as you have just told me, there is no such provision in this case. So that it is distinguishable, and I reject this statement.

MR. AUSTRIAN: Your Honor --

THE COURT: Don't make statements of that sort in briefs to me. Be more careful, please.

All right, go ahead, Mr. Greenfield.

MR. GREENFIELD: I would also like to again cite the defendants' own brief with respect to the Pommerantz case, which is the other leading Massachusetts case.

THE COURT: I can't put much reliance on the defendants' briefs from now on, if you are citing them.

MR. GREENFIELD: In this case, I would like to put my not complete faith but substantially so, because I think their language is very appropriate here.

They say, "Demand may be excused if a derivative plaintiff demonstrates that there was no impartial internal corporate forum to which he could resort."

That's partially the defendant's own language and

2 partially the quotation from the opinion.

I maintain, your Honor, that it is impossible for Mr. Mason, or any other independent minority share-holder of the trust, to have any voice in any internal corporate forum as this Court or, I should say, as the

Court in Pommerantz used that term.

In fact, we have all of the defendants, with the exception of Peat, Marwick, who has now been dismissed, represented by essentially the same counsel who have submitted the same brief, and it is hard for me to understand how any of them can be impartial when they take the identical position, when there are so many essentially disparate interests, namely, the trust on the one hand, the independent trustees on the other, and City Investing and City Planning Corporation on the other side.

The defendants seem to throw, when it is to their convenience, these distinctions in the plaintiffs' case, and I don't know whether you wish me to address that point at this point or not; and that's with relation to the possibility of representation of both the class and derivative --

THE COURT: No. I don't want to get into that.

The only point I am interested in now is the question of demand on the shareholders. I thought this was like the

2 Jones case.

MR. GREENFIELD: I think, your Honor, it is distinguishable enough and, in any case, if we go back to the Massachusetts law, there is room under those existing cases which essentially are the basis of the Massachusetts law in this area to provide for, with judicial assistance, the institution of such a suit without a demand.

I really have nothing else I can say on the point.

THE COURT: All right. May I hear then from the defendants?

MR. AUSTRIAN May it please the Court, the Court has referred to a provision in the declaration of trust which was designed to allow the trust to be treated as a corporation. It states specifically there that the trust is like a corporation for purposes of shareholder demand.

The question has been raised not only in Jones but in other proceedings whether the trust is supposed to be treated any differently; differently in any way for purposes of demand.

This Court, in Jones, declined to treat the trust differently than a corporation.

The Court in Greenspun v. Lindley declined to treat the trust any differently than a corporation.

In a case called Wachtel v. Baker, which was also a Massachusetts trust, which has been recently affirmed by the Appellate Division in New York, that trust did not have a specific provision --

THE COURT: Wait. You are telling me that some Massachusetts case has been recently affirmed by the Appellate Division?

MR. AUSTRIAN: I'm not, your Honor.

THE COURT: They made great strides in jurisprudence, but I didn't realize we had gotten that close.

MR. AUSTRIAN I misspoke. There was Greenspun v. Lindley that was decided by the Appellate Division.

Another case involving a real estate investment trust called Institutional Investment Trust, the same motion was made, and it was appealed to the Appellate Division.

In that trust there was no provision in the declaration of trust specifically stating or containing the provision provided in the Equitable declaration of trust.

Nonetheless, the Appellate Division affirmed the lower court's decision dismissing --

THE COURT: The lower court, I take it, was in New York?

MR. AUSTRIAN: The lower court was New York

Supreme Court. I apologize.

The point I wish to make is that this particular provision has no great significance. We don't here seek to deprive the shareholders of their right to vote as to whether or not this case should go forward. We don't claim that the shareholders have these rights.

As I read this declaration of trust, that provision was put in there to assure that the shareholders had a right to make a decision as to what the trust ought to do.

I think the shareholders have that right here, and I certainly don't think that a provision in the declaration of trust is required to give them that right.

The point has been made that there is no impartial forum within which to see whether this suit ought to go forward.

Your Honor, the importial forum in this case that we are asking a demand to be made upon are the share-holders of this trust.

We are not here before your Honor saying that the trustees ought to be polled. We have not taken that position.

We do think that the shareholders are entitled to make a decision as to whether a holder of 1,000 shares,

1

3

4

5

6

7

8 9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

as opposed to 2,600,000 outstanding, is entitled to plunge this trust into lengthy litigation.

That is precisely what the Massachusetts courts have held. I don't really think there is much room to argue that the law is any different.

THE COURT: Does this trust have a provision that indemnifies directors, in case after litigation there is no liability imposed on them, for their expenses in the litigation?

MR. AUSTRIAN: I believe it does, your Honor.

THE COURT: So that if the plaintiff in the litigation, in the derivative litigation, which admittedly is for the benefit, at least on the record, of the corporation; if the plaintiff loses, then the trust has to reimburse the individual defendants for all of their expenses, and thus the resulting litigation could be a substantial detriment to the trust.

MR. AUSTRIAN: That's correct, your Honor.

THE COURT: In other words, they wind up not only getting the derivative windfall, so to speak, or the derivative recovery, but they wind up out of pocket by the amount of dollars or the trustees' expenses.

MR. AUSTRIAN That's true.

THE COURT: All right.

c

May I see that Jones opinion again? Maybe I can determine to what extent this difference about the declaration of trust should affect this. Let me just look at it a moment.

Offhand, it seems to me that this is probably a significant difference. At least Pommerantz, and I don't know about the other case that is argued -- I will give counsel a chance to tell me about it -- relates to a business corporation. This isn't a Massachusetts corporation, and I relied on the declaration of trust section to authorize the shareholders to vote as to whether or not a corporate action should be brought or maintained derivatively.

Apparently the provision goes on to say that in such respect they are to vote to the same extent as the shareholders of a Massachusetts corporation. Immediately follows a statement by me:

"It is clear that under Massachusetts law demand must be made on shareholders of a business corporation before a derivative action may be brought."

In the absence of anything in the declaration of trust similar to that in the Jones-Equitable case, how can I treat -- what is it -- a Massachusetts trust in this respect like a business corporation?

MR. AUSTRIAN: I think, your Honor, that I would like to refer to the Greenspun v. Lindley case.

Now, in Greenspun v. Lindley, which is cited by the Court in your opinion, the precise issue is before the Court; in Greenspun v. Lindley, there was also a provision in the declaration of trust similar to that in this case.

THE COURT: In which case?

MR. AUSTRIAN: In the Jones v. Equitable case.

The issue was raised below, and we invite the Court to read the Appellate Division decision in that case, that for purposes of shareholder demand a business corporation ought to be treated differently than a Massachusetts business trust.

That issue is raised within the context not only of shareholder demand but also director demand, and that point was raised and briefed quite thoroughly at that time.

The Court of Appeals held that --

THE COURT: What Court of Appeals?

MR. AUSTRIAN: The New York Court of Appeals

held --

THE COURT: Did Greenspun go to the Court of Appeals?

MR. AUSTRIAN: Yes, it did. The Court of

Appeals affirmed on the basis of director demand, and it affirmed the dismissal of the case on the issue of whether demand had been properly made on the board of directors

5

1

3

6

or board of trustees here.

for purposes of demand.

7

9

10

11

12

13

14

15

16

17 18

19

20

21 22

23

24

25

The Court said, and I don't have the language in front of me, but I invite your Honor to look at it, that it sees no reason to make any distinction whatsoever between a business trust and a Massachusetts corporation

In doing so, it didn't rely on the provision of the declaration of trust. It cited it, but cited it in a footnote.

THE COURT: Do you have the Court of Appeals opinion here? Anybody have it?

MR. AUSTRIAN: Your Honor, we don't have it here. I would be glad to send it to you.

THE COURT: I can't afford to just study these things. Could one of you run up and get it? What is the citation, the New York Supplement?

MR. GREENFIELD: I just got the citation on the Appellate Division case, your Honor.

MR. AUSTRIAN: The Appellate Division citation is 352 New York Supp. 633. The Court of Appeals citation is 389 New York Supp. 2d, 125.

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. AUSTRIAN: I think that the point that the Court had in mind is that there was no logical reason why one ought to treat a business trust differently than

THE COURT: Could you get those for me?

a business corporation.

I think our position is here that the lack of a particular provision in the declaration of trust does not mean that the shareholders don't have that right, nor does it mean that this business trust ought to be treated any differently than a corporation. And I believe that that was the holding of Greenspun v. Lindley. It was certainly the position in Wachtel v. Baker, which is cited in our brief.

THE COURT: That's just confusing me, getting me off on that. Apparently I didn't realize that Greenspun v. Lindley ever got to the Court of Appeals, but I see otherwise.

MR. AUSTRIAN: It's cited in our brief on page 16.

THE COURT: What does it mean, "Affirmed on other grounds"?

MR. AUSTRIAN: It means that the Appellate Division specifically dealt with the issue of shareholder demand and dismissed the complaint for failure to make

2 a demand on the trustees.

The Court of Appeals didn't need to reach the issue of shareholder demand, because it dismissed for failure to make a demand upon the trustees of the Massachusetts REIT.

THE COURT: Why, then, is the Court of Appeals opinion of any help on the question of demand on share-holders?

MR. AUSTRIAN: I think that the Court of Appeals opinion is helpful because it says, or just asks the general question: Is there any reason to distingish between a Massachusetts business trust and a Massachusetts corporation?

The Court states, if my recollection is right, there is no legal or logical justification for making any such distinction, and it doesn't rely on the declaration of trust.

I do believe it's mentioned in the footnote, but that is certainly not the cornerstone of its opinion.

I would submit to the Court that there really isn't any reason to distinguish between a business corporation and a business trust. In this instance, we have public shareholders of a business trust as you have public shareholders of a corporation.

dhja 83a I don't believe there is any reason to deny the shareholders of a trust the same rights it would have it it were a corporation. If this trust were a corporation, and I think many --THE COURT: Well, it isn't a corporation. You can't have it both ways. MR. AUSTRIAN: No, but there is no reason to distinguish between those two entities. THE COURT: Certainly there is, plenty of reason. They didn't pay the corporation taxes, they didn't file as a corporation, they had some reason for skulking around as a trust instead of a corporation, doubtless to avoid Massachusetts taxes or other taxes.

If they are going to have it that way, why should they be given the advantages of corporations?

I see nothing logical about your argument.

MR. AUSTRIAN: The question is whether the shareholders of a business trust should be denied the same rights as the shareholders of a corporation.

THE COURT: Should be denied the same rights?

MR. AUSTRIAN: Yes, your Honor.

THE COURT: Nobody is denying them any rights.

MR. AUSTRIAN: The right to say that a lawsuit which they think shouldn't be brought in fact not be brought,

17 18

19

16

1

2

3

4

5

7

9

10

11

13

14

20 21

23

24

25

What we have asked here and we suggested is, on the law of Massachusetts, that before litigation can go forward and the business trust be required to pay funds to defend itself, and also for the directors --

THE COURT: Well, maybe we can get out of this quagmire if you can show me any Massachusetts case involving a business trust which has denied prosecution of a derivative action because no demand was made on the shareholders.

We have seen that Pommerantz is not such a case.

MR. AUSTRIAN: Your Honor, I am not suic that it is Pommerantz, but I would like to look. I think there is a Massachusetts case dismissing on shareholder demand.

THE COURT: I beg your pardon?

MR. AUSTRIAN: There is a Massachusetts case dismissing on shareholder demand where the entity involved was not a corporation.

In Pommerantz v. Clarke, the entities involved were policyholders of a mutual insurance company, not a corporation.

THE COURT: Wait. Is that the same Pommerantz we have been talking about?

> That's correct, your Honor. MR. AUSTRIAN: THE COURT: I may be wrong, but I say it is

24

21

22

23

25

clear that under Massachusetts law, demand must be made on shareholders of a business corporation before a derivative action may be brought. Pommerantz v. Clarke.

I may be all wrong.

MR. AUSTRIAN: No, your Honor, it's a corporation but it's a Massachusetts life insurance corporation which has policyholders instead of shareholders.

Your Honor, if I could refer you to page 344 on the bottom, the right-hand side, the new paragraph:
"This is, of course, not a suit by a shareholder, and it is not a suit --

THE COURT: 347 of what?

MR. AUSTRIAN: I'm sorry, 101, F. Supp., 344.

THE COURT: Yes?

MR. AUSTRIAN: "This is, of course, not a suit
by a shareholder, and it is not a suit against a business
corporation. It is an action by a policyholder against
a mutual life insurance company, different in legal structure,
in size, and in practical internal corporation functioning
from a relatively small company involving the Soloment
case, and even from the large railroad involved in the
Bartlett case. Nothing of legal significance is to be
attributed to the mere fact that the plaintiff is a policyholder rather than a stockholder."

1 | 2 | 3 | 4 | 5 | 6 | 7 |

I submit, your Honor, that nothing of legal significance is true here where you have shareholders who have bought stock in a Massachusetts business trust, a publicly owned business trust, and the shareholders of a business corporation.

I have a copy of the opinion.

THE COURT: I am not as certain as I was in the Jones-Equitable case, but reading Judge Wyzanski's opinion, he being a Massachusetts lawyer, he does say that there is no reason to treat a mutual life insurance company or a business trust different from a corporation in the respect to which we have referred.

So I think the rule that I thought fit to apply in Jones-Equitable will apply here, and I will dismiss these two derivative claims.

MR. AUSTRIAN: Thank you, your Honor.

THE COURT: Let me hear from Mr. Greenfield.

Wait. It's your motion for s tay, isn't it?

MR. AUSTRIAN: Yes, your Honor.

THE COURT: All right. Well, I'm not quite so clear about that yet.

MR. GREENFIELD: Your Honor, may I just address a couple of the points raised by Mr. Austrian?

THE COURT: You mean on this last matter?

9

8

11

13

14

16

17

18

19 20

21

22

23

ZA

25

Ī

MR. GREENFIELD: Yes, I will try and be very brief, your Honor.

THE COURT: Of course.

MR. GREENFIELD: First of all, if we can accept the defendants' position at all, namely, that the shareholders have no such right to bring a derivative action and in fact have to go to some extraordinary means, then it would seem to me that that is a substantial diminution of their natural rights as shareholders, that they would have as a corporation.

If that is the case, and it is of such significant materiality, it certainly should have appeared in their prospectus, and there is not a word to that effect in the prospectus, your Honor, at least that I can find.

There is no warning --

THE COURT: That might be some ground for some separate lawsuit, but it is not any ground that would affect the maintenance of a derivative claim.

MR. GREENFIELD: I merely cite that for the proposition that if the defendants felt that the share-holders didn't have those rights, to bring a derivative suit, which they would have in any other corporation, perhaps save in Massachusetts, that certainly should have been disclosed to them.

Now, I recognize that that might be a 10(b)(5) claim that would have no part in the derivative aspect, but certainly if the defendants regard that as being of such importance and of such significance, I can't see why they didn't disclose it to the shareholders.

THE COURT: Why did they think when they organized it that it would have any significance?

MR. GREENFIELD: Well, they seemed to have gone into the utmost detail in this document, the prospectus and registration statement, about the remote possibility of stockholders being sued --

THE COURT: Yes.

MR. GREENFIELD: -- for obligations of the trust, which is far more a remote possibility.

THE COURT: Yes, but it is of much more lively interest to the shareholders who are going to be sued themselves than it is that they might be able to participate in some frolic that might result in putting the bee on some trustees. This is something that would touch and affect them very intimately.

It's like a stockholder of a bank. I don't know whether they now are responsible, is it, for double the par value of their stock? When I was a child that used to be true. Stockholders of banks were all terribly worried

2 about getting sued.

MR. GREENFIELD: I guess from your Honor's vantage point, you are absolutely right. I won't address that point any further.

However, I do think Mr. --

THE COURT: Well, you have a perfectly good point, but I don't think it is worth changing my views because of it.

MR. GREENFIELD: The other point that Mr. Austrian did -- or I guess your Honor brought up the question of whether the trust would have to reimburse the trustees if there were a judgment against them --

THE COURT: Yes. That's the burden of these derivative suits. If it were just something that the corporation could stand by and suffer no damage, if the suit is lost, maybe that is one thing.

But if it could be stuck with a large amount in counsel fees and expenses, that's a different thing.

MR. GREENFIELD: Well, what Mr. Austrian chose to avoid telling you, your Honor, was that there is a provision, I'm sure, in their indemnification language that provides that if the defendants, namely, the trustees, acted in any way fraudulently as we have charged --

THE COURT: Oh, certainly.

MR. GREENFIELD: Then the trust wouldn't be obligated to pay their expenses.

THE COURT: I understand that.

MR. GREENFIELD: And under the allegations that we have set forth in this complaint, it is clear that we are charging them with fraud.

THE COURT: Oh, I understand that. If you win your lawsuit, there is no problem about that. It is only if you lose it, and they have a claim against the trust.

The result of the lawsuit is just not that the trust is where it was before you started, but it might saddle them with a liability which would affect every share-holder.

MR. GREENFIELD: I will acknowledge that.

One last thing --

THE COURT: It is not enough to change the result, it is just one of the things that often occurred to us on the bench in connection with these cases.

MR. GREENFIELD: One last thing: Again, Mr.

Austrian, I believe, misled the Court, or perhaps he didn't intend to, but nevertheless we talked about the impartial forum, and again he said that a shareholder of the trust has this great impartial forum, he can go to the shareholders.

But that is not what the Massachusetts law

provides, and that is not what the Pommerantz case says.

It says an impartial internal forum, meaning the trustees

in this case. And they certainly aren't impartial.

THE COURT: Well, for better or for worse, I think the derivative claims can't be maintained.

Now, tell me briefly about the stay, and I say briefly, because I have to acknowledge that my inclination is to stay the Mason action.

MR. AUSTRIAN: I don't know what I can say, your Honor. Our position --

THE COURT: You can tell me briefly the reasons for it, because I went over these papers, but I can't keep everything in my mind all the time.

MR. AUSTRIAN: Our position on the Mason motion is that both Mason and Steinberg contain virtually identical allegations of fact. In fact, they are almost carbon copies. That is not to say that all of them are identical, but virtually all of them.

Mason was brought about two months, not quite, but about two months after Steinberg was brought. We feel that in Mason we have had a class action motion filed after Steinberg, we have interrogatories filed, interrogatories that are not duplicative, although many are

UNITED STATES DISTRICT COURTY SOUTHERN DISTRICT OF NEW YORK

IRVING MASON, on behalf of himself and all others similarly situated, and derivatively on behalf of C.I. REALTY INVESTORS,

75 Civ 1811 (13VY)

Plaintiff

CITY INVESTING COMPANY, C.I. REALTY INVESTORS, C.I. PLANNING CORPORATION, WILLIAM POLK CAREY, JOHN L. GIBBONS, PETER C.R. HUANG, JAMES V. TOMAI, JR., ROBERT M. MORGAN, WILLIAM S. RENCHARD, FRED R. SULLIVAN and JAMES R. WEBB, REYNOLDS SECURITIES, INC. and PEAT, MARWICK, MITCHELL & CO.

ORDER AND

Perendants 2 1976

Defendants City Investing Company, C.I. Realty Investors,
C.J. Planning Corporation, John L. Gibbons, Peter C. R. Huang, James V.

Tomai, Jr., William S. Renchard, Fred R. Sullivan and Reynolds Securities Inc.

having moved this court for an order staying Counts I, II, III and VI of the

Amended Complaint on the grounds that the prosecution of the instant case

concurrently with that of Steinberg v. Carey 75 Civ 1695(IBW) results in

needless expenditure of the resources and time of defendants and the Court since

both actions are virtually identical and dismissing Counts IV and V of the

Amended Complaint on the grounds that Plaintiff has failed to make upon the

security holders of defendant C.I. Realty Investors as required by Massachusetts

law and on the grounds that Plaintiff cannot properly maintain a suit derivatively

on behalf of defendant C.I. Realty Investors at the same time he is prosecuting

direct claims against such defendant, and oral argument on these motions having

been heard, IT IS HEREBY ORDERED, adjudged and Beenersti

A. That all proceedings and discovery in connection with Counts 1, 11, 111 and VI of the Amended Complaint herein (the direct claims) are stayed until final determination of the related case of Steinberg v. Carey, 75 Civ 1695 (IBW) er ontil the earlier dates certification in Steinberg v. Carpy, 75 Giv 1675 (18

B. That Counts IV and V of the amended complaint herein (the derivative claims) are dismissed on the grounds that Plaintiff has failed to make demand upon the security holders of defendant C.T. Realty Investors as required by Massachusetts

The Court having and an account that there is no just reason for dalay;

IT IS FURTHER ORDERED that pursuant to Rule 54(b) of the Federal Rules of Civil Procedure entry of a final judgment in favor of defendants is hereby directed as to Counts IV and V (the derivative claims).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IRVING MASON, on behalf of himself : and all others similarly situated, and derivatively on behalf of : C. I. REALTY INVESTORS,

Plaintiff

V.

CITY INVESTING COMPANY,
C. I. REALTY INVESTORS,
C. I. PLANNING CORPORATION,
WILLIAM POLK CAREY,
JOHN L. GIBBONS,
PETER C. R. HUANG,
JAMES V. TOMAI, JR.,
ROBERT M. MORGAN,
WILLIAM S. RENCHARD,
FRED R. SULLIVAN,
JAMES R. WEBB,
REYNOLDS SECURITIES, INC., and
PEAT, MARWICK, MITCHELL & CO.,

75 Civil 1811 (IBW)

Defendants

NOTICE OF APPEAL

Notice is hereby given that plaintiff Irving Mason hereby appeals to the United States Court of Appeals for the Second Circuit from the Order and Final Judgment entered May

4, 1976, dismissing the derivative claims asserted by plaintiff.

Richard D. Greenfield 111 Presidential Boulevard Bala-Cynwyd, PA 19004

and

Mortimer B. Wolf Rembar, Wolf & Curtis 19 West 44th Street New York, NY 10036

Attorneys for Plaintiff Irving Mason

DATED: